FORM NLRB-501

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
04-CA-171036	3/4/167

INSTRUCTIONS

File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer		b. Number of workers employed
Kelly Services, Inc.		Over 1,000
c. Address (street, city, state, ZIP code)	d. Employer Representative	e. Telephone No.
Kelly Services, Inc. 999 West Big Beaver Road Troy, MI 48084	Gibley and McWilliams, P.C. Joseph W. Gibley Speros J. Kokonos 524 N. Providence Road Media, PA 19063 (610) 627-9500 (610) 627-2400 (fax) Seyfarth Shaw LLP Gerald Maatman Pamela Q. Devata 131 S. Dearborn St, Ste. 2400 Chicago, IL 60603 (312) 460-5965 Laura J. Maechtlen Michael W. Stevens Shireen Y. Wetmore 560 Mission Street, Ste. 3100 San Francisco, CA 94105 (415) 397-2823	248-362-4444 Fax: No: Unknown
f. Type of Establishment (factory, mine, wholesaler, etc.)	g. Identify principal product or service	
Temporary employment agency	Providing employees for other businesses	

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsection (1) of the Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since in or around February 2015, and on a continuing basis, Kelly Services, Inc. ("Kelly"), by and through its agents, has violated Section 8(a)(1) of the Act by maintaining arbitration agreements which interfere with applicants' and employees' Section 7 rights.

Since in or around February 2016, and on a continuing basis, Kelly has violated Section(a)(1) of the Act by attempting to enforce its unlawful arbitration agreements to prevent its applicants/employees from exercising their Section 7 rights to participate in class action litigation in the U.S. District Court for the Middle District of Pennsylvania.

By the above and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

T Jason Noye

4a. Address (street and number, city, state and ZIP code)	4b. Telephone No:
2060 Union Church Road Seven Valley, PA 17360	Contact through counsel Fax: No: Contact through counsel

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization. N/A

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Title: Staff attorney
Signature of representative or person making charge

Address: Marielle Macher, Esq.
Community Justice Project
118 Locust Street
Harrisburg, PA 17101

Telephone No.: 717-236-9486, ext. 214

Fax No.: 717-233-4088

Date: Mar. 4, 2016

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

Download NLRB Mobile App

March 4, 2016

Kelly Services, Inc.
999 W Big Beaver Rd
Troy, MI 48084-4716

Re: Kelly Services, Inc.
Case 04-CA-171036

Dear Sir or Madam:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney Lea Alvo-Sadiky whose telephone number is (215)597-7630. If this Board agent is not available, you may contact Supervisory Examiner CARA L. FIES-KELLER whose telephone number is (215)597-7636.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be

considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

DENNIS P. WALSH
Regional Director

Enclosures:
1. Copy of Charge
2. Commerce Questionnaire

cc: Joseph Gibley, Esquire
Gobley and McWilliams, P.C.
524 N. Providence Road
Media, PA 19063

Gerald Maatman, Esquire
Seyfarth Shaw LLP
131 S Dearborn
Suite 2400
Chicago, IL 60091

Laura Maechtlen, Esquire
Seyfarth Shaw LLP
560 Mission St
Suite 3100
San Francisco, CA 94105

Revised 3/21/2011 NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
	04-CA-171036

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed).*

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT *(Check appropriate box):* **[ ] CALENDAR YR [ ] 12 MONTHS or [ ] FISCAL YR** *(FY dates)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $		
H. **Gross Revenues** from all sales or performance of services ***(Check the largest amount)*** [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KELLY SERVICES, INC. Charged Party and **MARIELLE MACHER, ESQ.** Charging Party	**Case 04-CA-171036**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on March 4, 2016**,** I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Joseph Gibley, Esquire
Gobley and McWilliams, P.C.
524 N. Providence Road
Media, PA 19063

Kelly Services, Inc.
999 W Big Beaver Rd
Troy, MI 48084-4716

Gerald Maatman, Esquire
Seyfarth Shaw LLP
131 S Dearborn
Suite 2400
Chicago, IL 60091

Laura Maechtlen, Esquire
Seyfarth Shaw LLP
560 Mission St
Suite 3100
San Francisco, CA 94105

March 4, 2016
Date

Patricia Kraus
Designated Agent of NLRB
Name

/s/ Patricia Kraus
Signature

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

Download NLRB Mobile App

March 4, 2016

Marielle Macher, Esquire
Community Justice Project
c/o T Jason Noye
118 Locust St
Harrisburg, PA 17101-1414

Re: Kelly Services, Inc.
Case 04-CA-171036

Dear Mr. Macher:

The charge that you filed in this case on March 04, 2016 has been docketed as case number 04-CA-171036. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney Lea Alvo-Sadiky whose telephone number is (215)597-7630. If this Board agent is not available, you may contact Supervisory Examiner CARA L. FIES-KELLER whose telephone number is (215)597-7636.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing *Form NLRB-4701, Notice of Appearance*. This form is available on our website, www.nlrb.gov, or at the Regional office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: As the party who filed the charge in this case, it is your responsibility to meet with the Board agent to provide a sworn affidavit, or provide other witnesses to provide sworn affidavits, and to provide relevant documents within your possession. Because we seek to resolve labor disputes promptly, you should be ready to promptly present your affidavit(s) and other evidence. If you have not yet scheduled a date and time for the Board agent to take your affidavit, please contact the Board agent to schedule the affidavit(s). If you fail to cooperate in promptly presenting your evidence, your charge may be dismissed without investigation.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website www.nlrb.gov or from the Regional Office upon your request. *NLRB Form 4541, Investigative Procedures* offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

DENNIS P. WALSH
Regional Director

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Kelly Services, Inc.

and

Community Justice Project

CASE 04-CA-171036

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF Kelly Services, Inc.

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ **REPRESENTATIVE IS AN ATTORNEY**

☒ **IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.**

(REPRESENTATIVE INFORMATION)

NAME: Gerald L. Maatman, Jr.

MAILING ADDRESS: Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603

E-MAIL ADDRESS: gmaatman@seyfarth.com

OFFICE TELEPHONE NUMBER: 312-460-5965

CELL PHONE NUMBER: _____ *FAX:* 312-460-7000

SIGNATURE: Gerald Maatman LLS
(Please sign in ink.)

DATE: 3/14/2016

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Kelly Services, Inc.

and

Community Justice Project

CASE 04-CA-171036

☒ REGIONAL DIRECTOR ☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF

Kelly Services, Inc.

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ REPRESENTATIVE IS AN ATTORNEY

☒ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: Karla E. Sanchez

MAILING ADDRESS: Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603

E-MAIL ADDRESS: ksanchez@seyfarth.com

OFFICE TELEPHONE NUMBER: 312-460-5277

CELL PHONE NUMBER: _____ *FAX:* 312-460-7277

SIGNATURE: _____
(Please sign in ink.)

DATE: 3/14/2016

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

SEYFARTH SHAW

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Writer's direct phone
(312) 460-5965

Writer's e-mail
gmaatman@seyfarth.com

April 27, 2016

VIA E-MAIL

Lea Alvo-Sadiky
Field Attorney
National Labor Relations Board, Region 4
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413
lea.alvo-sadiky@nlrb.gov

Re: Kelly Services, Inc.
Case No. 04-CA-171036

Dear Ms. Alvo-Sadiky:

As you know, we represent Kelly Services, Inc. ("Kelly") in connection with the referenced charge filed by the Community Justice Project ("Charging Party") on behalf of individual [redacted] ("[redacted]"). This letter is in response to the charge filed on March 4, 2016 and your April 7, 2016 letter requesting information.

According to your letter, the Charging Party alleges that Johnson & Johnson, Inc. ("J&J") "hires" temporary employees through Kelly and that [redacted] was one of those individuals "hired" by J&J. According to the Charging Party, in February 2015, J&J offered [redacted] "employment" and as part of his employment, Kelly provided [redacted] an allegedly unlawful mandatory arbitration agreement.

Kelly denies that its arbitration agreement is unlawful. Further, Kelly disagrees with the mischaracterization of the employment relationship that existed or would have existed between J&J, Kelly, and [redacted] At all relevant times, Kelly would have been [redacted] only employer, with [redacted] performing work at one or several of Kelly's clients' sites.

There is no need to address the lack of merit of the Charging Party's allegations because the Region must dismiss the charge based on the fact that [redacted] is not protected under the National Labor Relations Act ("NLRA" or "Act"). [redacted] applied for an [redacted] position.[1] The duties of the position were supervisory in nature and show

[1] [redacted] never worked in the operations manager position.

that [redacted] in the operations manager role, possessed the indicia of a supervisor under Section 2(11) of the NLRA. Therefore, [redacted] is not an "employee" protected under the Act. Thus, absent withdrawal, this case must be dismissed.

Background

[redacted] applied for an Operations Manager position out of J&J's McNeal Lancaster, Pennsylvania location. The McNeal location is a manufacturing plant where Pepcid is manufactured. The job description for this position sets forth, among other things, the following duties:

*Accountable for executing short-term production objectives, ensuring proper and compliant utilization of labor, equipment, information and raw materials.

*Provides input in developing strategy and departmental business plan.

*Reviews and approves manufacturing and packaging batch records.

*Responsible for achieving day-to-day process outcome and delivering process results. Focuses on efficiency of process, reduced changeovers, customer service goals, compliance, cost management and training.

*Effectively manages Operations Associate performance and development to support company policies, procedures and goals.

*Partners with peer group to investigate and implement best practices across the business.

*Effectively communicates the need for change.

*Supports departmental budgets, efficiencies, and compliance metrics.

*Identifies and prioritizes improvement priorities (process, equipment, systems) with the PRT.

*Ensures lines are adequately staffed on a regular basis and plans are in place to meet ongoing staffing needs to reflect changing priorities.

*Reviews and approves manufacturing and packaging batch records.

*Maintains superior housekeeping and appearance through walkthroughs.

*Leads non-conformance investigations including Quality Notifications, Consumer Complaints and ensures process is in compliance with Environmental and Safety regulations.

*Ensures all safety/environmental observations are remediated.

*Provides timely and honest feedback and coaches and mentors others to achieve their highest potential.

*Oversees performance and hold associates accountable for results.

*Provides guidance and coaching to associates in managing their assigned areas or lines.

*Performs direct report performance reviews and development plans.

To perform these duties, the operations manager has a team of 10 to over 20 employees—the number varying depending on the tasks needed to be completed and the volume of production. The operations manager can recommend the hiring or firing of any of his employees and can also recommend that any of his employees be promoted, or receive different pay, or other terms and conditions of employment. Additionally, the operations manager is responsible in all respects for his team. He is responsible for their safety, for managing and directing their work, providing feedback to the employees, holding them accountable by coaching them and issuing them discipline, and conducting their performance reviews and development plans. Additionally, if employees have any concerns, issues, or problems, they can address these issues or concerns with the operations manager. Depending on the issues addressed, the operations manager can determine whether to take action.

Each day, the operations manager must use his independent judgement to determine how to meet the daily operational goals of his area. For example, if the operations manager has a rush order that needs to be completed that day, the operations manager can order employees to stop working on other projects, can move them to any of the production lines, which he controls, can ask them to perform any of the tasks that are needed to complete the rush order, and can direct them on how to perform these tasks as efficiently and quickly as possible. Thus, on a daily basis it is the operation manager's job to use his independent judgment to assess his operational needs and determine how best to use his staff to fulfill these needs. In sum, the operations manager has control of his area, and possesses the ability to recommend and/or perform the following duties: hire, transfer, suspend, promote, discharge, assign, reward, discipline, direct, and address employees' complaints or issues.

Analysis

The test for supervisory status under Section 2(11) of the Act has 3 parts: 1) whether the individual possesses any of the 12 supervisory indicia; 2) whether the exercise of the supervisory authority is not merely clerical in nature, but requires the use of independent judgment; and 3) whether the individual holds the authority in the interest of the employer. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

Here, all three parts are met. Section 2(11) of the Act states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the

> foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). As set forth above, the operations manager possesses the supervisory indicia set forth under Section 2(11) of the Act. The operations manager is responsible for his team including making determinations with respect to hiring, firing, transferring, directing and assigning duties. This supervisory authority is not clerical in nature. Rather, each day, the operations manager must assess the work that needs to be performed and determine how best to use his staff to perform the work. Finally, the supervisory authority that the operations manager possesses is in the interest of the employer as it is driven by the employer's production goals. Given these facts, the operations manager position is a position which falls under Section 2(11) of the Act.

If you have any questions or would like to discuss further, please let me know.

Very truly yours,

SEYFARTH SHAW LLP

/s/ Gerald L. Maatman

Gerald L. Maatman

GLM

COMMUNITY JUSTICE PROJECT

June 13, 2016

Lea Alvo-Sadiky
National Labor Relations Board
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106

VIA E-MAIL

Re: (b) (6), (b) (7)(C) *v. Kelly Services, Inc.*, No. 04-CA-171036; (b) (6), (b) (7)(C) *v. Johnson & Johnson Services, Inc.*, No. 04-CA-171041

Dear Ms. Alvo-Sadiky:

I represent Charging Party (b) (6), (b) (7)(C) in the above-referenced charge. I am writing in response to your notice that Kelly Services, Inc. ("Kelly") is claiming that (b) (6), (b) (7)(C) was applying for a supervisory position. Our position on this issue is explained below.

I. Background

In or around February 2015, (b) (6), (b) (7)(C) applied to work at a Johnson & Johnson Services, Inc. ("J&J") facility through Kelly, a staffing agency. *See* Compl. ¶ 17, Ex. A. As part of the hiring process, Kelly obtained a background report on (b) (6), (b) (7)(C) Compl. ¶ 30. Following the background report, Kelly and J&J rescinded (b) (6), (b) (7)(C) employment offer, without providing (b) (6), (b) (7)(C) a pre-adverse action notice, a copy of (b) (6), background report, or a statement of (b) (6), rights under the Fair Credit Reporting Act ("FCRA"). Compl. ¶¶ 33, 36-37. As a result of Kelly and J&J wrongfully rescinding (b) (6), (b) (7)(C) offer, (b) (6), (b) (7)(C) never began working for Kelly or J&J.

On December 11, 2015, (b) (6), (b) (7)(C) filed a class action complaint in the United States District Court for the Middle District of Pennsylvania, alleging that Kelly and J&J systemically violated the FCRA. *See* Compl. The class action is on behalf of three classes of similarly-situated employees and job applicants. Compl. ¶ 50.

On February 22, 2016, Kelly and J&J both moved to compel arbitration. *See* Kelly's Motion to Compel Arbitration and Stay Pending Action, Ex. B; J&J's Motion to Compel Arbitration and to Dismiss, or, in the Alternative, to Stay All Proceedings, Ex. C. The purported arbitration agreement that they produced forbids bringing or participating in class or collective actions. *See* Arbitration Agreement at 2, Ex. D.

On March 4, 2016, (b) (6), (b) (7)(C) filed charges with the National Labor Relations Board ("NLRB"), alleging that Kelly's and J&J's maintenance and enforcement of Kelly's purported arbitration agreement interfered with, restrained, and coerced applicants and employees in the exercise of

their Section 7 rights under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, thereby violating Section 8(a)(1) of the NLRA.

II. Argument

Kelly is incorrect in insisting that (b) (6), (b) (7)(C) was a statutory supervisor under the NLRA. In any event, however, the issue Kelly raises is irrelevant, because Kelly's and J&J's conduct undoubtedly affects covered employees, and (b) (6), (b) (7)(C) does not need standing to file an NLRB charge.

A. (b) (6), (b) (7)(C) was not a Statutory Supervisor.

First, (b) (6), (b) (7)(C) was a covered applicant for employment, not a statutory supervisor.[1] Under the NLRA, a statutory supervisor includes only those individuals who

> hav[e] authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

"The burden of proving supervisory status rests with the person asserting it," and it must be established "by a preponderance of the evidence." *J.C. Penney Corp., Inc. & Local 3, United Storeworkers, Retail, Wholesale & Dep't Store Union, United Food & Commercial Workers Union*, 347 NLRB 127, 129 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001)); *The Republican Co.*, 361 NLRB No. 15 (Aug. 7, 2014). A party cannot show statutory supervisory status if "the record evidence 'is in conflict or otherwise inconclusive.'" *The Republican Co.*, 361 NLRB No. 15 (quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). Further, "[m]ere inferences or conclusionary [sic] statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *Alternate Concepts, Inc.*, 358 NLRB 292, 294 (2012) (citations omitted).

Moreover, "[i]t is well settled that possession of the title of supervisor does not in itself confer supervisory status under the Act." *Hallandale Rehab. & Convalescent Ctr.*, 313 NLRB 835, 836 (1994) (citations omitted); *see also Kellogg Brown & Root LLC & Molycorp, Inc. & David L. Totten, an Individual*, JD(SF)-16-16, 2016 WL 1358280 (Apr. 4, 2016). Rather, the employee must perform at least one of the duties enumerated under § 152(11) through the "exercise[] independent judgment on behalf of the employer." *Id.*

[1] Applicants for employment are protected as employees under the NLRA. *See N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995).

The party asserting supervisory status must prove that "the individuals actually exercise a supervisory function or . . . effectively recommend the exercise of a supervisory function." *Brusco Tug & Barge, Inc. & Int'l Org. of Masters, Mates & Pilots, Pac. Mar. Region, Afl-Cio, Petitioner*, 359 NLRB No. 43 (Dec. 14, 2012) (citing *In Re Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006)). "[I]solated instances" of supervisory-type authority are not enough to confer supervisory status. *Hallandale Rehab. & Convalescent Ctr.*, 313 NLRB at 836; *see also In Re Kanawha Stone Co.*, Inc., 334 NLRB 235, 237 (2001) (same).

Establishing supervisory status is a difficult burden to meet. Many duties associated with the term "supervisor" in ordinary parlance do not convey supervisory status under the NLRA. For example, writing employee evaluations or issuing warnings to employees do not convey supervisory status, unless the evaluations or warnings result in direct personnel action without the need for any higher-level independent review. *See, e.g.*, *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989); *see also Veolia Transp. Servs., Inc. & Amalgamated Transit Union, Local 1637, Afl-Cio*, 363 NLRB No. 98 (Jan. 20, 2016). Similarly, authority to coach or counsel lower-level employees does not convey supervisory status either. *See, e.g.*, *Brusco Tug & Barge, Inc. & Int'l Org. of Masters, Mates & Pilots, Pac. Mar. Region, Afl-Cio, Petitioner*, 359 NLRB No. 43.

Here, Kelly cannot possibly establish supervisory status, because (b) (6), (b) (7)(C) was never permitted to begin working. (b) (6), (b thus never exercised or recommended the exercise of a single supervisory duty enumerated under § 152(11). *See, e.g.*, *id.* (explaining that exercising or recommending the exercise of a supervisory duty is what makes one a supervisor). Indeed, (b) (6), (b) (7)(C) was little different than any other person submitting an application for employment—a group that is ordinarily covered under the NLRA. *See, e.g.*, *Town & Country Elec., Inc.*, 516 U.S. at 87. This, alone, makes clear that (b) (6), (b) (7)(C) was not a statutory supervisor.

But even if the NLRB looks to the job description that Kelly sent to (b) (6), (b) (7)(C) (which it should not do, given that (b) (6), (b) (7)(C) never started working), the job description is vague and does not clearly contain any of the supervisory functions under § 152(11). *See* Feb. 11, 2015 E-mail from (b) (6), (b) (7)(C) to (b) (6), (b) (7)(C), Ex. E. For instance, although the job description indicates that (b) (6), (b) (7)(C) would have been able to coach and provide feedback to employees—tasks which *do not* convey supervisory status— it gives no indication that (b) (6), (b) (7)(C) would have been able to perform actual supervisory responsibilities, such as disciplining or terminating underperforming employees. *Id.* In fact, given that the job description is for the weekend night shift for a temporary, one-year, non-salaried position, it is very difficult to imagine that (b) (6), (b) (7)(C) would have had any such supervisory responsibilities. The job description therefore confirms that (b) (6), (b (b) (6), (b) (7)(was not a statutory supervisor.

Beyond the job description provided to (b) (6), (b) (7)(C), any other evidence Kelly may attempt to submit must be rejected as purely speculative. (b) (6), (b) (7)(C) was denied the chance to ever begin working at the J&J facility, so there is simply no credible evidence of what other job responsibilities (b) (6), may or may not have performed in practice (and Kelly, having denied (b) (6), (b (b) (6), (b) (7)(the opportunity to begin working, should not be allowed to invent such responsibilities now). The job description is the only possible credible evidence of what would have been Mr.

(b) (6), (b) (7)(C) job responsibilities, and it is inconclusive, at best, as to supervisory status. Thus, (b) (6), (b) (6), (b) (7)(cannot be considered a statutory supervisor under the NLRA.

B. Whether (b) (6), (b) (7)(C) was a Statutory Supervisor is Irrelevant.

In any event, whether or not (b) (6), (b) (7)(C) was a statutory supervisor does not matter for purposes of the NLRB's enforcement powers. There are no standing requirements to file an NLRB charge. *See* 29 C.F.R. § 102.9; *NLRB. v. Television & Radio Broad. Studio Emp., Local 804*, 315 F.2d 398, 401 (3d Cir. 1963). It is well established that "any person," even a complete "stranger," may file a charge. 29 C.F.R. § 102.9; *N.L.R.B. v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17 (1943).

(b) (6), (b) (7)(C) has alleged that Kelly is wrongfully maintaining and enforcing an arbitration agreement to prevent numerous other employees from participating in class action litigation—rights protected under Section 7 of the NRLA. *See Murphy Oil Usa, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014); *In re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012). In fact, Kelly concedes that since at least February 2015, its "policies required that *all applicants for employment* as Kelly temporary employees . . . complete and sign a series of hiring forms as part of the application process," which purportedly included the arbitration agreement.[2] *See* Dec. of (b) (6), (b) (7)(C) ¶ 2 (emphasis added), Ex. F.

There is no serious question that "all applicants for employment" with Kelly includes numerous non-supervisory employees. For instance, in *Gaffers v. Kelly Services, Inc.*, No. 16-10128, a Fair Labor Standards Act collective action filed in the United States District Court for the Eastern District of Michigan in which Kelly has also attempted to enforce its arbitration agreements, the plaintiff collective action members are home-based customer care agents—a job that plainly does not fall within the statutory supervisory exemption. *See Gaffers v. Kelly Services, Inc.* Compl. ¶¶ 3-4, Ex. H; Kelly's Motion to Compel Arbitration in *Gaffers v. Kelly Services, Inc.*, Ex. I.

Because these other types of employees are indisputably affected by Kelly's arbitration agreement in the instant matter, (b) (6), (b) (7)(C) own status is irrelevant. The NLRB has the power to issue a complaint regardless of whether or not (b) (6), (b) (7)(C) is a statutory supervisor.

III. Conclusion

(b) (6), (b) (7)(C) is not a statutory supervisor, because (b) (6) never started working for Kelly, and, in the alternative, there is no credible evidence (b) (6) would have had supervisory responsibilities. But regardless, the NLRB does not require charging parties to have standing, so whether or not (b) (6), (b) (6), (b) (7)(was a statutory supervisor is irrelevant, and we respectfully request that the NLRB issue a complaint.

[2] A declaration submitted by ((b) (6), (b) (7)(C) in *Gaffers v. Kelly Services, Inc.* states that Kelly has required that all applicants for employment sign the arbitration since November 2014. *See* Second Dec. of (b) (6), (b) (7)(C) ¶ 3, Ex. G.

Please let me know if you require any further information, and thank you for giving us the opportunity to submit our position on this issue.

Sincerely,

/s/ Marielle Macher

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

(b) (6), (b) (7)(C), individually and on behalf of all others similarly situated,	:	
	:	**Case No. 15-**
Plaintiff,	:	
v.	:	**CLASS ACTION**
JOHNSON & JOHNSON and KELLY SERVICES, INC.,	:	
	:	**Jury Trial Demanded**
Defendants.	:	

CLASS ACTION COMPLAINT

COMES NOW Plaintiff (b) (6), (b) (7)(C) on behalf of (b) (6), (b) (7)(C) and all others similarly situated, and files this Class Action Complaint against Johnson & Johnson and Kelly Services, Inc. Plaintiff alleges, based on personal knowledge as to Defendants' actions and upon information and belief as to all other matters, as follows:

I. NATURE OF THE CASE

1. Plaintiff brings this action against Defendants for violations of the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681a–1681x.

2. Defendant Johnson & Johnson ("J&J") is an international company in the business of marketing and selling consumer healthcare products, medical devices and pharmaceuticals, through its more than 250 companies located in 60 countries. *See* http://www.jnj.com/about-jnj/company-structure.

3. J&J staffs these services with consumers like Plaintiff through recruitment and hiring services provided by Defendant Kelly Services, Inc. ("Kelly"), a worldwide temporary employment staffing company. *See* http://www.kellyservices.com/Global/home/.

4. As part of its hiring process, J&J and Kelly use criminal background reports generated by nationwide consumer reporting agencies ("CRAs"), to make employment decisions. Among the CRAs utilized by Defendants for this purpose are Verifications, Inc. and Yale Associates, Inc. ("Yale"). Because such employment decisions are based in whole or in part on the contents of the criminal background reports, J&J and Kelly are obliged to adhere to certain important provisions of the FCRA.

5. When obtaining permission from job applicants to screen or check out their backgrounds, J&J and Kelly are required by the FCRA to first disclose in writing to the consumer, "in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes." 15 U.S.C. § 1681b(b)(2).

6. Plaintiff contends that Defendant Kelly systematically violates section 1681b(b)(2) of the FCRA by procuring and using consumer reports for employment purposes without first disclosing in writing to the consumer, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes. The job applicants were required to sign a form Background Screening Notice, Disclosure, and Authorization ("Disclosure Form") that was not the stand-alone document required by the FCRA and that required the applicants to, among other things, authorize the procurement of a consumer report "at any time, and any number of times, as Kelly in its sole discretion determines is necessary before, during or after my employment, until I revoke this authorization in writing."

7. When using criminal background reports for employment purposes, J&J and Kelly must, *before* declining, withdrawing, or terminating employment based in whole or in part on the

contents of the report, provide job applicants like Plaintiff with a copy of their respective reports and a written summary of their rights under the FCRA. 15 U.S.C. § 1681b(b)(3).

8. Plaintiff contends that Defendants systematically violate section 1681b(b)(3) of the FCRA by using consumer reports to make adverse employment decisions without, beforehand, providing the person who is the subject of the report sufficient and timely notification and a copy of the report and a summary of rights under the FCRA, effectively leaving the person who is the subject of the report without any opportunity to correct any errors on the report or to even know who prepared the background report about him or her which formed a basis for the adverse action.

9. Providing a copy of the criminal background report, as well as a statement of consumer rights before making a final adverse employment decision, arms the nation's millions of job applicants with the knowledge and information needed to challenge inaccurate, incomplete, and misleading criminal background reports. The FCRA is designed to permit individuals whose reports are inaccurate with ample time to identify the inaccuracies and correct them before the employer makes an employment decision.

10. To complete this process as to Plaintiff [redacted] J&J and Kelly hired Yale, a CRA which operates in many instances as both the consumer reporting agency generating the background check as well as the agent of the employer to execute all decisions based on the information contained therein. Further, Yale even goes so far as to compare the background reports it generates against hiring criteria provided to it by J&J and Kelly, adjudicating those individuals as fit for employment.

11. Plaintiff brings nationwide class claims against J&J and Kelly under 15 U.S.C. § 1681b(b)(3) because they failed to provide Plaintiff with a copy of the criminal background report

that was used to deny his employment and a summary of his rights under the FCRA before taking adverse action against [redacted] Plaintiff also brings a nationwide class claim against Defendant Kelly because it used and relied upon the non-compliant Disclosure Form and/or otherwise failed to properly obtain [redacted] authorization and consent prior to procuring his background report.

II. PARTIES

12. Plaintiff [redacted] is a "consumer" as protected and governed by the FCRA.

13. Defendant J&J is incorporated under the laws of New Jersey doing business under the laws of the Commonwealth of Pennsylvania and markets its services throughout the United States, including within this District.

14. Defendant Kelly has offices located at 3 Montage Mountain Road, Suite 4, Moosic, Pennsylvania, 18507.

III. JURISDICTION AND VENUE

15. The Court has federal question jurisdiction under the FCRA, 15 U.S.C. § 1681p, and 28 U.S.C. § 1331.

16. Venue is proper in this Court because J&J and Kelly can be found in this District. 28 U.S.C. § 1391(b)(3). Defendants regularly sell their products and services in this District.

IV. FACTUAL ALLEGATIONS

A. Plaintiff's Application For Employment With J&J

17. Plaintiff [redacted] applied for a position as an Operations Supervisor with J&J through Kelly in or around February of 2015. On February 11, 2015, Plaintiff was formally offered the job in writing, which [redacted] also accepted in writing that same day.

18. On February 13, 2015, Plaintiff was presented with and signed the Disclosure Form.

19. The Disclosure Form was in the name of Defendant Kelly. On information and belief, Defendant J&J relies upon Kelly's use of the Disclosure Form to obtain background reports on applicants for employment with J&J.

20. The standardized Disclosure Form that Kelly required (b) (6), (b) (7)(C) to sign was not the "clear and conspicuous disclosure . . . in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes" as required by section 1681b(b)(2)(A)(i) of the FCRA.

21. Instead, the Disclosure Form unlawfully included the following improper and extraneous language that distracts the consumer from the purpose of the stand-alone disclosure which is simply to inform the consumer "that a consumer report may be obtained for employment purposes." The extraneous and distracting language in the Disclosure Form includes the following:

- Defendants use the Disclosure Form to ostensibly obtain permission to procure consumer reports "at any time, and any number of times, as Kelly in its sole discretion determines is necessary before, during or after my employment, until I revoke this authorization in writing." There is no authority in the FCRA permitting employers to obtain such unlimited, blanket authorizations for procuring consumer reports, and certainly not after the consumer's employment with Defendants has terminated.

- Defendants use the Disclosure Form to obtain permission to acquire "written or oral information from any business, professional or personal associates or neighbors, including your co-workers and any references you listed on your application or resume."

- The Disclosure Form includes paragraphs of extraneous state-specific information.

- The Disclosure Form requires the consumer to agree that "Kelly will notify me if a consumer reporting agency other than Verifications, Inc. is used to obtain a consumer report."

22. Many courts have held that such extraneous language and restrictions violate the

stand-alone requirement. *See also Martin v. Fair Collections & Outsourcing, Inc*., 2015 WL 4064970, *4 (D. Md. June 30, 2015) (holding that plaintiff stated a claim for willful violation of section 1681b(b)(2) and observing: "Here, in addition to the disclosure that the consumer report would be obtained for employment purposes, FCO's form contains an authorization to obtain the report, information on when the applicant must challenge the accuracy of any report, an acknowledgement that the employee understands that 'all employment decisions are based on legitimate non-discriminatory reasons,' the name, address and telephone number of the nearest unit of the consumer reporting agency designated to handle inquiries regarding the investigative consumer report, and several pieces of state-specific information.").

23. Defendant Kelly knew or should have known that its failure to provide a stand-alone disclosure was a violation of the FCRA because the statutory language of section 1681b(b)(2)(A) was pellucidly clear that Defendants could not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless "a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, ***in a document that consists solely***[1] ***of the disclosure***, that a consumer report may be obtained for employment purposes." 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis supplied).

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[1] According to the Merriam-Webster online dictionary, the word "solely" is defined as "without anything or anyone else involved;" and "to the exclusion of all else." *See* http://www.merriam-webster.com/dictionary/solely. According to dictionary.com, "solely" means "exclusively or only." *See* http://dictionary.reference.com/browse/solely. These dictionary definitions of the word "solely" leave no doubt that a document disclosing that an employer planned to obtain a consumer report does not "consist[] solely of the disclosure" when the document also contains a release of liability.

24. In addition, interpretations of the FCRA by the Federal Trade Commission (FTC) from 1998, seventeen years prior to Defendants' requirement that (b) (6), (b) (7)(C) sign the form, show that extraneous language in a background authorization or disclosure form violates the FCRA. In response to company inquiries, the FTC issued two opinion letters addressing section 1681b(b)(2)'s "consists solely" language. The first letter explicitly states that "inclusion of . . . a waiver [of one's FCRA rights] in a disclosure form will violate" section 1681b(b)(2) because the form will not "consist 'solely' of the disclosure." Letter from William Haynes, Attorney, Div. of Credit Practices, Fed. Trade Comm'n, to Richard W. Hauxwell, CEO, Accufax Div. (June 12, 1998). The second letter stated that the FCRA prohibits disclosure forms "encumbered by any other information ... [in order] to prevent consumers from being distracted by other information side-by-side with the disclosure." Letter from Clarke W. Brinckerhoff, Fed. Trade Comm' n, to H. Roman Leathers, Manier & Herod (Sept. 9, 1998).

25. Numerous courts interpreting the FCRA have found FTC opinion letters persuasive. *See, e.g.,* *Owner–Operator Independent Drivers Ass'n, Inc. v. USIS Commercial,* 537 F.3d 1184, 1192 (10th Cir. 2008); *Morris v. Equifax Info. Servs., LLC,* 457 F.3d 460, 468 (5th Cir. 2006). *See also*, *Gager v. Dell Financial Services, LLC,* 727 F.3d 265, 271-72 n.5 (3d Cir. 2013) (affording some deference to Federal Communication Commission analysis and finding it persuasive in interpreting Telephone Consumer Protection Act).

26. The FCRA statutory text, the FTC opinions and case law constitute significant authority existing during the time that Defendants were required to provide stand-alone disclosures.

27. The Disclosure Form that Defendant Kelly provided to Plaintiff violated section 1681b(b)(2) of the FCRA because the document did not consist "solely of the disclosure that a consumer report may be obtained for employment purposes." 15 U.S.C. § 1681b(b)(2)(A)(i).[2] Among other things, the Disclosure Form was deliberately designed by Kelly to extract from [redacted] and other applicants their agreement that Kelly could obtain and procure consumer reports on them at any time and for any reason forever in the future regardless of whether the applicant had any ongoing employment relationship with the company. There is no reasonable reading of the statutory language of FCRA section 1681b(b)(2) that would justify the inclusion of such language in an FCRA disclosure or the practice of obtaining and using consumer reports in the manner that Kelly's Disclosure Form provides for.

B. Defendants' Treatment of Plaintiff's Application For Employment

28. When Plaintiff filled out the application, Plaintiff indicated that [redacted] After viewing the application, Kelly communicated to Plaintiff, by email on

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[2] *See Groshek v. Great Lakes Higher Education Corporation*, 2015 WL 7294548 (W.D. Wis. Nov. 16, 2015); *Manuel v. Wells Fargo Bank, N.A.*, 2015 WL 4994538 (E.D. Va. Aug. 19, 2015); *Groshek v. Time Warner Cable, Inc.*, 2015 WL 4620013 (E.D. Wis. July 31, 2015); *Martin v. Fair Collections & Outsourcing, Inc.*, 2015 WL 4064970 (D. Md. June 30, 2015); *Moore v. Rite Aid Hdqtrs Corp.*, 2015 WL 3444227 (E.D. Pa. May 29, 2015); *Lengel v. HomeAdvisor, Inc.*, 2015 WL 208893 (D. Kan. May 6, 2015); *Speer v. Whole Food Market Group, Inc.*, 2015 WL 1456981 (M.D. Fla. March 30, 2015)); *Milbourne v. JRK Residential America, LLC*, 2015 WL 1120284 (E.D. Va. March 10, 2015); *Miller v. Quest Diagnostics*, 2015 WL 545506 (W.D. Mo. Jan. 28, 2015); *Jones v. Halstead Management Company, LLC*, 2015 WL 366244, *5-6 (S.D.N.Y. Jan. 27, 2015); *Avila v. NOW Health Group, Inc.*, 2014 WL 3537825, *2-3 (N.D. Ill. July 17, 2014); *Reardon v. Closetmaid Corporation*, 2013 WL 6231606, *10-11 (W.D. Pa. Dec. 2, 2013) (finding disclosure with liability waiver to be "facially contrary to the statute at hand, and all of the administrative guidance"); *Singleton v. Domino's Pizza, LLC*, 2012 WL 245965, *9 (D. Md. Jan. 25, 2012) ("[B]oth the statutory text and FTC advisory opinions indicate that an employer violates the FCRA by including a liability release in a disclosure document.")

February 16, 2015, that it needed additional information, but that the [redacted] would not necessarily bar [redacted] from employment with Kelly and J&J.

29. Plaintiff promptly supplied Kelly with all requested documentation. Plaintiff also repeatedly reached out to Kelly and offered to answer questions or provide additional information throughout the process.

30. As part of its application procedure, Kelly, on behalf of J&J, purchased a consumer report from Yale on Plaintiff.

31. On February 20, 2015 Kelly contacted Plaintiff informing [redacted] of the process [redacted] should expect leading up to and in the first days of his employment, and that background screening generally takes 3-7 days to be completed. [redacted] was also told that his start date would be delayed due to the screening.

32. On March 10, 2015, Kelly informed Plaintiff that [redacted] had cleared its screening process but that J&J had its own process that was still under way.

33. On March 13, 2015, Kelly informed Plaintiff that J&J would not be hiring [redacted] This adverse action was based on a background report obtained from Yale.

34. The background report from Yale was inaccurate and misleading. While Plaintiff has [redacted] Yale misreported [redacted] all of which cost Plaintiff [redacted] job with J&J.

35. Plaintiff immediately requested a letter explaining the reasoning for rescinding the job offer. After a week went by with no response, Plaintiff again requested that Kelly provide [redacted] with the information that was used in the decision process.

36. At no time during any of these communications did Kelly provide Plaintiff with a copy of [redacted] Yale report or a statement of [redacted] rights under the FCRA, and Plaintiff still has yet to receive the report from Kelly.

37. At no time during any of these communications did J&J provide Plaintiff with a copy of [redacted] Yale report or a statement of [redacted] rights under the FCRA, and Plaintiff still has yet to receive the report from J&J.

C. <u>J&J's and Kelly's Practices and Policies</u>

38. J&J and Kelly have created and implemented national, uniform hiring and staffing policies, procedures, and practices under which they operate. Those policies, procedures, and practices cover the use of "background checks" or "consumer reports" to screen potential employees.

39. Under the FCRA, any "person" using a consumer report, such as J&J and Kelly, who intends to take an "adverse action" on a job application "based in whole or in part" on information obtained from the consumer report must provide notice of that fact to the consumer-applicant, and must include with the notice a copy of the consumer report and a notice of the consumer's dispute rights under the FCRA, *before* taking the adverse action. 15 U.S.C. § 1681b(b)(3)(A); *see also Miller v. Johnson & Johnson,* 80 F. Supp. 3d 1284, 1289 (M.D. Fla. 2015); *Goode v. LexisNexis Risk & Info. Analytics* 848 F. Supp. 2d 532, 542 (E.D. Pa. 2012) (more than one business can be a user of a single background report; "[u]nder the FCRA, 'person' means

any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. § 1681a(b). Thus, defendant is a person and must comply with § 1681b(b)(3)(A).").

40. There is longstanding regulatory guidance for employers making clear their obligations and the protections afforded to job applicants under the FCRA. The Federal Trade Commission ("FTC") has long held that Section 604(b)(3)(a) [15 U.S.C. § 1681b(b)(3)(A)] "requires that all employers who use consumer reports provide a copy of the report to the affected consumer before any adverse action is taken. Employers must comply with this provision even where the information contained in the report (such as (b) (6), (b) (7)(C) would automatically disqualify the individual from employment or lead to an adverse employment action. Indeed, this is precisely the situation where it is important that the consumer be informed of the negative information in case the report is inaccurate or incomplete." *See* Federal Trade Commission letter dated June 9, 1998 to A. Michael Rosen, Esq.

41. A primary reason that Congress required that a person intending to take an adverse action based on information in a consumer report provide the report to the consumer before taking the adverse action is so the consumer has time to review the report and dispute information that may be inaccurate, or discuss the report with the prospective employer before adverse action is taken. *See* Federal Trade Commission letter dated December 18, 1997 to Harold R. Hawkey, Esq. ("[T]he clear purpose of the provision to allow consumers to discuss reports with employers or otherwise respond before adverse action is taken.").

42. Numerous courts interpreting the FCRA have found FTC opinion letters persuasive. *See*, *e.g.*, *Owner-Operator Independent Drivers Ass'n, Inc. v. USIS Commercial*, 537

F.3d 1184, 1192 (10th Cir. 2008); *Morris v. Equifax Info. Servs., LLC*, 457 F.3d 460, 468 (5th Cir. 2006). *See also Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271-72 n.5 (3d Cir. 2013) (affording some deference to Federal Communication Commission analysis and finding it persuasive in interpreting Telephone Consumer Protection Act).

43. Consistent with that purpose, federal courts have held that the prospective employer must provide the report to the consumer "a sufficient amount of time before it takes adverse action so that the consumer may rectify any inaccuracies in the report." *Williams v. Telespectrum, Inc.*, No. 3:05CV853, 2006 WL 7067107, at *5 (E.D. Va. Nov. 7, 2006); *Beverly v. Wal-Mart Stores, Inc.*, No. 3:07CV469, 2008 WL 149032 (E.D. Va. Jan. 11, 2008) (quoting *Williams*). In *Reardon v. Closetmaid Corp*., No. 08-1730, 2011 WL 1628041 (W.D. Pa. April 27, 2011), the court certified a class action for prospective employees who did not receive a copy of their consumer report at least five days before being notified that the employer might take adverse action.

44. The reasons for the "pre-adverse action notice" requirement with regard to employment situations are to alert the job applicant that he or she is about to experience an adverse action, such as a rejection, based on the content of a report, and to provide him or her an opportunity to challenge the accuracy or relevancy of the information with the consumer reporting agency or the user before that job prospect or job is lost.

45. Defendants typically do not provide job applicants with a copy of their consumer reports or a statement of their FCRA rights before they take adverse action against them based on the information in such reports, despite being required to do so by section 1681b(b)(3)(A) of the FCRA.

46. The FCRA statutory text, the FTC opinions and the cases cited constitute significant authority that existed during the time Defendants failed to comply with the pre-adverse action requirements of 15 U.S.C. § 1681b(b)(3)(A).

47. As a result of these FCRA violations, J&J and Kelly are liable to Plaintiff, and to each Class member, for statutory damages from $100 to $1,000 pursuant to 15 U.S.C. § 1681n(a)(1)(A), plus punitive damages pursuant to 15 U.S.C. § 1681n(a)(2), and attorneys' fees and costs pursuant to 15 U.S.C. §§ 1681n and 1681o.

48. Defendants' conduct and omissions were willful. Because the FCRA was enacted in 1970, Defendants have had years to become compliant but have failed to do so.

49. J&J and Kelly were aware of their obligations under the FCRA as they relate to employment because they hired Yale not only to perform its background checks but also to (attempt to) provide J&J's and Kelly's pre-adverse action notices to job applicants. J&J and Kelly therefore knew of the requirements imposed upon them by the FCRA and failed to craft a system that would ensure compliance with those requirements.

V. CLASS ACTION ALLEGATIONS

50. Pursuant to Federal Rule of Civil Procedure 23 and 15 U.S.C. § 1681b, Plaintiff brings this action for himself and on behalf of the following Classes:

> (a) All natural persons residing within the United States and its Territories regarding whom, within five years prior to the filing of this action and extending through the resolution of this action, Defendant Kelly procured or caused to be procured a consumer report for employment purposes using a written disclosure containing language substantially similar in form to the Disclosure Form provided to (b) (6), (b) (7)(C) and described above (the "Section 1681b(b)(2) Class").
>
> (b) All employees or applicants for employment with Defendant J&J residing in the United States (including all territories and other political subdivisions of the United States) who were the subject of a background report

procured or caused to be procured from a consumer reporting agency that was used by J&J to make an adverse employment decision regarding such employee or applicant for employment, within five years prior to the filing of this action and extending through the resolution of this case, and for whom J&J failed to provide the applicant a copy of his or her consumer report or a copy of the FCRA summary of rights before it took such adverse action (the "J&J Section 1681b(b)(3) Class").

(c) All employees or applicants for placement through Defendant Kelly residing in the United States (including all territories and other political subdivisions of the United States) who were the subject of a background report procured or caused to be procured from a consumer reporting agency that was used by Kelly to make an adverse employment decision regarding such employee or applicant for employment, within five years prior to the filing of this action and extending through the resolution of this case, and for whom Kelly failed to provide the applicant a copy of his or her consumer report or a copy of the FCRA summary of rights before it took such adverse action (the "Kelly Section 1681b(b)(3) Class").

Plaintiff reserves the right to amend the definition of the Classes based on discovery or legal developments.

51. Specifically excluded from the Classes are: (a) all federal court judges who preside over this case and their spouses; (b) all persons who elect to exclude themselves from the Classes; (c) all persons who have previously executed and delivered to J&J releases of all their claims for all of their Class claims; and (d) Defendants' employees, officers, directors, agents, and representatives and their family members.

52. **Numerosity.** The Classes are so numerous that joinder of all members is impracticable. At this time, Plaintiff does not know the exact size of the Classes but public filings by J&J and Kelly indicate that they will be in the many thousands. Based on information and belief, the Classes are comprised of at least thousands of members who are geographically dispersed throughout the country so as to render joinder of all Class members impracticable. The names and addresses of the Class members are identifiable through documents maintained by

Defendants, and the Class members may be notified of the pendency of this action by published and/or mailed notice.

53. **Commonality.** Common questions of law and fact exist as to all members of the Classes, and predominate over the questions affecting only individual members. The common legal and factual questions include, among others:

(a) Whether Defendants Kelly willfully or negligently violated section 1681b(b)(2) of the FCRA by procuring or causing to be procured consumer reports for employment purposes without providing a clear and conspicuous disclosure in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes;

(b) Whether Defendants J&J and Kelly failed to provide each applicant for employment a copy of their consumer report before Defendants took adverse action based upon a disqualifying or adversely scored consumer report;

(c) Whether Defendants J&J and Kelly failed to provide each applicant for employment a copy of their written notice of FCRA rights before Defendants took adverse action based upon the consumer report; and,

(d) Whether Defendants J&J and Kelly acted willfully or negligently in disregard of the rights of employment applicants in their failure to permit their employees and automated systems to send employment applicants their full consumer report and a written statement of their FCRA rights before taking adverse action based on the consumer report.

54. **Typicality**. Plaintiff's claims are typical of the claims of each Class member. Plaintiff has the same claims for statutory and punitive damages that (b)(6) seeks for absent class members.

55. **Adequacy.** Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff's interests coincide with, and are not antagonistic to, other Class members' interests. Additionally, Plaintiff has retained counsel experienced and competent in complex, commercial, multi-party, consumer, and class-action litigation. Plaintiff's counsel have prosecuted complex FCRA class actions across the country.

56. **Predominance and Superiority.** Questions of law and fact common to the Class members predominate over questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication of the controversy. The statutory and punitive damages sought by each member are such that individual prosecution would prove burdensome and expensive given the complex and extensive litigation necessitated by Defendants' conduct. It would be virtually impossible for the Class members individually to redress effectively the wrongs done to them. Even if the Class members themselves could afford such individual litigation, it would be an unnecessary burden on the courts. Furthermore, individualized litigation presents a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and to the court system presented by the complex legal and factual issues raised by Defendants' conduct. By contrast, the class action device will result in substantial benefits to the litigants and the Court by allowing the Court to resolve numerous individual claims based upon a single set of proof in a unified proceeding.

57. Furthermore, individualized litigation presents a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and to the court system presented by the complex legal and factual issues raised by Defendants' conduct. By contrast, the

class action device will result in substantial benefits to the litigants and the Court by allowing the Court to resolve numerous individual claims based upon a single set of proof in just one case.

VI. CAUSES OF ACTION

COUNT 1

15 U.S.C. § 1681b(b)(2)

58. Plaintiff realleges and incorporates by reference all preceding allegations.

59. Plaintiff is a "consumer," as defined by the FCRA, 15 U.S.C. § 1681a(c).

60. The background reports ordered by Defendants are "consumer reports" within the meaning of 15 U.S.C. § 1681a(d).

61. Defendant Kelly is liable for willfully or negligently violating section 1681b(b)(2) of the FCRA by procuring or causing to be procured a consumer report for employment purposes without first providing a clear and conspicuous disclosure in writing to the consumer in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes.

COUNT 2

15 U.S.C. § 1681b(b)(3)(A)

62. Plaintiff incorporates by reference those paragraphs set out above.

63. Plaintiff is a "consumer," as defined by the FCRA, 15 U.S.C. § 1681a(c).

64. The Yale background report ordered by Defendants is a "consumer report" within the meaning of 15 U.S.C. § 1681a(d).

65. The FCRA provides that any person "using a consumer report for employment

purposes" who intends to take any "adverse action based in whole or in part on the report," must provide the consumer with a copy of the report *and* a written description of the consumer's rights under the FCRA, as prescribed by the Federal Trade Commission, before taking such adverse action. 15 U.S.C. § 1681b(b)(3)(A).

66. For purposes of this requirement, an "adverse action" includes "any . . . decision . . . that adversely affects any current or prospective employee." 15 U.S.C. § 1681a(k)(1)(B)(ii).

67. Defendants J&J and Kelly are each a "person" and each regularly uses background reports for employment purposes. 15 U.S.C. § 1681a(b).

68. The FCRA requires Defendants, as users of consumer reports for employment purposes, before taking adverse action based in whole or in part on the report, to provide to the consumer to whom the report relates, a copy of the report and a written description of the consumer's rights under the FCRA. 15 U.S.C. §§ 1681b(b)(3)(A)(i) and (ii).

69. Defendants willfully and negligently violated section 1681b(b)(3) of the FCRA by failing to provide Plaintiff and the members of the Classes the following before using such reports: (a) the required Pre-Adverse Action Notice; (b) a copy of the consumer report; and (c) a written description of the consumer's rights under the FCRA.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Classes pray for relief as follows:

A. That an order be entered certifying the proposed Classes under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiff and his counsel to represent the Classes;

B. That judgment be entered in favor of the Section 1681b(b)(2) Class, the J&J Section 1681b(b)(3) Class and the Kelly Section 1681b(b)(3) Class against Defendants for statutory

damages and punitive damages for violation of 15 U.S.C. § 1681b(b)(3), pursuant to 15 U.S.C. § 1681n;

C. That the Court award costs and reasonable attorneys' fees, pursuant to 15 U.S.C. §§ 1681n and 1681o; and

D. That the Court grant such other and further relief as may be just and proper, including but not limited to any equitable relief that may be permitted.

VIII. TRIAL BY JURY

Plaintiff hereby requests a trial by jury on those causes of action where a trial by jury is allowed by law.

DATED: December 10, 2015

Respectfully submitted,

By: *James A. Francis*

James A. Francis
John Soumilas
David A. Searles
FRANCIS & MAILMAN, P.C.
Land Title Building, 19th Floor
100 South Broad Street
Philadelphia, PA 19110
(215) 735-8600

Marielle Macher
COMMUNITY JUSTICE PROJECT
118 Locust Street
Harrisburg, PA 17101
717-236-9486, ext. 214

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(b) (6), (b) (7)(C)

Plaintiff,

v.

JOHNSON & JOHNSON and KELLY SERVICES, INC.,

Defendants.

Civil Action No. 1:15-cv-02382-YK

(The Hon. Yvette Kane)

DEFENDANT KELLY SERVICES, INC.'S MOTION TO COMPEL ARBITRATION AND TO STAY PENDING ACTION

Please take notice that Defendant Kelly Services, Inc. ("Kelly"), by and through the undersigned counsel and pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), hereby moves the Court for an order compelling Plaintiff (b) (6), (b) (7)(C) to arbitrate [redacted] claims on an individual, bilateral basis pursuant to the parties' binding agreement to arbitrate. Defendant Kelly further requests that the Court stay these proceedings pending completion of the arbitration, pursuant to the FAA. 9 U.S.C § 3. In support thereof, Defendant Kelly states as follows:

1. On February 12, 2015, Plaintiff (b) (6), (b) (7)(C) entered into an agreement with Kelly in which the parties agreed to arbitrate all claims related to

Plaintiff's employment. Despite the parties' express, written agreement to arbitrate, Plaintiff subsequently brought the above-captioned action in this Court, alleging two causes of action related to Plaintiff's employment with Kelly.

2. Kelly certifies that it sought concurrence in this motion to compel arbitration from all parties to the case, pursuant to L.R. 7.1. Defendant Johnson & Johnson concurred in the motion and further agreed to stipulate to arbitration of all claims against Johnson & Johnson or, in the alternative, to stay the claims against Johnson & Johnson pending resolution of the arbitration of Plaintiff's claims against Kelly. Plaintiff refused.

3. Pursuant to the FAA and the valid and binding arbitration agreement between Plaintiff and Defendant Kelly, Plaintiff cannot proceed with his claims against Kelly. As such, the Court should compel all of Plaintiff's claims against Kelly to individual, bilateral arbitration, and stay this action pending resolution of arbitration. Kelly further moves this Court to stay the matter as to all parties pending resolution of this Motion.

In support of Defendant Kelly's Motion to Compel Arbitration and to Stay Pending Action, Defendant Kelly shall rely on its concurrently filed Memorandum of Law and supporting evidence submitted therewith.

DATED: February 22, 2016

Respectfully submitted,

By: _____

GIBLEY & McWILLIAMS PC
Joseph W. Gibley

SEYFARTH SHAW LLP
Gerald L. Maatman, Jr., *pro hac vice pending*
Pamela Q. Devata, *pro hac vice pending*
Laura J. Maechtlen, *pro hac vice pending*,
Michael W. Stevens, *pro hac vice pending*
Shireen Y. Wetmore, *pro hac vice pending*

Attorneys for Defendant
KELLY SERVICES INC.

CERTIFICATE OF CONCURRENCE NON-CONCURRENCE PURSUANT TO LOCAL RULE 7.1

Movant's undersigned counsel certifies pursuant to Local Rule 7.1 that counsel for Defendant Kelly Services, Inc. has sought concurrence in the Motion from each Party and that such concurrence has been GRANTED by Defendant Johnson and Johnson and DENIED by Plaintiff.

s/ Joseph W. Gibley
Joseph W. Gibley

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(b) (6), (b) (7)(C), individually and on behalf of all others similarly situated, Plaintiff, v. JOHNSON & JOHNSON and KELLY SERVICES, INC., Defendants.	Case No. 1:15-cv-02382-YK (Hon. Yvette Kane) Date Action Filed: December 11, 2015

DEFENDANT JOHNSON & JOHNSON SERVICES, INC.'S MOTION TO COMPEL ARBITRATION AND TO DISMISS OR, IN THE ALTERNATIVE, TO STAY ALL PROCEEDINGS

Defendant Johnson & Johnson Services, Inc. ("JJSI")[1] hereby moves this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*., for entry of an Order compelling arbitration of and dismissing the claims asserted by Plaintiff (b) (6), (b) (7)(C) ("Plaintiff") in the above-captioned civil action. As set forth in JJSI's Memorandum of Law, Plaintiff's claims against JJSI are the subject of a binding and valid arbitration agreement and, therefore, must be dismissed.

Alternatively, in the event that the Court determines that JJSI is not entitled to enforce the Agreement against (b) (6), (b) (7)(C) (which it should be entitled to), this Court

[1] Plaintiff's Complaint improperly names "Johnson and Johnson" as a Defendant; the correct entity is Johnson & Johnson Services, Inc.

should stay the instant proceedings against JJSI while Plaintiff and Kelly proceed to arbitration.

WHEREFORE, Defendant JJSI respectfully requests that the Court dismiss all of Plaintiff's claims and compel Plaintiff to submit all of those claims to arbitration or, in the alternative, stay all proceedings.

Respectfully Submitted,

REED SMITH LLP

By*: /s/ Shannon E. McClure*
Carolyn P. Short (Pa. ID 38199)
Shannon E. McClure (Pa. ID 164502)
Valerie Eifert Brown (Pa. ID 309849)
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Tel. (215) 851-8100
Fax (215) 851-1420

Michael O'Neil (*pro hac vice* to be filed)
10 S. Wacker Drive
Chicago, Illinois 60606
Tel. (312) 207-2879
Fax (312) 207-6400

Attorneys for Defendant
Johnson & Johnson Services, Inc.

DATED: February 22, 2016

CERTIFICATE OF NON-CONCURRENCE

Pursuant to Local Rule 7.1, the undersigned certifies that the concurrence of Plaintiffs' counsel to the relief sought in the foregoing Motion to Compel Arbitration and to Dismiss Or, In The Alternative, To Stay All Proceedings was sought, but that the Plaintiff's counsel did not concur.

s/ *Shannon E. McClure*
Shannon E. McClure

DATED: February 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel or parties of record electronically by CM/ECF.

s/ Shannon E. McClure
Shannon E. McClure

EXHIBIT 1

KELLY SERVICES

DISPUTE RESOLUTION AND MUTUAL AGREEMENT TO BINDING ARBITRATION

Internal Dispute Resolution. I acknowledge that raising issues or concerns internally may address my concerns more efficiently. I further acknowledge that Kelly encourages all employees/candidates to approach immediate supervisors or managers with any issues or concerns they have and, if the matter is not resolved in a timely or satisfactory fashion by those supervisors or managers, to contact the Human Resources Representative who supports their location or the Kelly Business Conduct and Ethics Reporting Program at https://www.integrity-helpline.com/kellyservices.jsp or 1-877-978-0049.

In the event that these internal dispute resolution procedures do not resolve my issues or concerns informally, and in consideration of my employment/consideration for employment with Kelly and Kelly's mutual promise to arbitrate the categories of claims for relief that fall within the scope of this Agreement, I agree as follows:

1. Agreement to Arbitrate. Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration, instead of going to court, for any "Covered Claims" that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.

2. Claims Subject to Agreement. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.**

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (*e.g.*, NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

4. Arbitration Rules. Arbitration under this Agreement shall be on an individual basis before a single arbitrator in the county in which the dispute arose (unless the parties mutually agree otherwise). The employment dispute resolution rules of the American Arbitration Association ("AAA") effective at the time of filing will apply, a copy of which is available at all times on MyKelly.com or upon request from your Kelly Representative. This Agreement shall be governed by the Federal Arbitration Act[1]. The Arbitrator shall have the authority to award the same damages and other relief that would have been available in court pursuant to applicable law.

5. Choice of Law. Both Kelly Services and I agree that any disputes related to my employment relationship with Kelly Services shall be governed by the laws of the State of Michigan (the location of Kelly's world headquarters), regardless of conflicts of law principles.

6. Limitations on Actions. Kelly Services and I agree to bring any claims that each party may have against the other within 300 days of the day that such party knew, or should have known, of the facts giving rise to the cause of action, and The parties mutually waive any longer, but not shorter, statutory or other limitations periods. This waiver includes, but is not limited to, the initial filing of a charge with the Equal Employment Opportunity Commission and/or state equivalent civil rights agency. However, I understand that I will thereafter have the right to pursue any federal claim in the manner prescribed in any right to sue letter that is issued by an agency.

7. Confidentiality of Proceedings. All arbitration proceedings are confidential, unless applicable law provides otherwise. The arbitrator shall maintain the confidentiality of the arbitration to the extent the law permits, and the Arbitrator shall have the authority to make appropriate rulings to safeguard that confidentiality.

[1] For California employees/candidates, both the Federal Arbitration Act and the California Arbitration Act will govern.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

9. Arbitration Fees and Costs. I understand Kelly Services shall pay all costs uniquely attributable to arbitration, including the administrative fees and costs of the arbitrator. Each side shall pay its own costs and attorneys' fees, if any, unless the Arbitrator rules otherwise. If the applicable law affords the prevailing party attorney fees and costs, then the Arbitrator shall apply the same standards that a court would apply to award such fees and costs.

10. Arbitrator. The parties agree that the Arbitrator shall be either a retired judge or an attorney who is experienced in employment law and licensed to practice law in the state where the arbitration will be held. The AAA rules shall govern selection of the Arbitrator.

11. Motions and Discovery. Notwithstanding any AAA rules to the contrary, either party shall have the right to file Motions to Dismiss and Motions for Summary Adjudication / Judgment. The Federal Rules of Evidence shall apply to all arbitration proceedings under this Agreement. The Code of Civil Procedure for my state of residence shall apply to all discovery requests and proceedings under this Agreement.

12. Arbitrator's Award. Regardless of the Arbitrator selected, the Arbitrator's award shall be in writing, with factual findings, reasons given, and evidence cited to support the award. Judgment on the award may be entered in any court having jurisdiction over the matter.

13. No Retaliation. I understand that I may have a statutory right (*e.g.*, under the National Labor Relations Act) to act concertedly on behalf of myself and others to challenge this Agreement in any forum, and that if I act concertedly to pursue any such proceeding Kelly Services will not retaliate against me for doing so. I also understand that Kelly Services may seek to enforce this Agreement, including my agreement to arbitrate all claims and my agreement to forego pursuing any claim on a class, collective or representative basis, and may assert this Agreement as a defense in any proceeding.

14. At-Will Employment. I further understand that this Agreement is not a contract of continued employment, and that Kelly Services' policy is employment at will, which permits either me or Kelly Services to terminate the employment relationship at any time, with or without cause or advance notice.

15. Modification and Revocation. This Agreement can be revoked or modified only by a writing signed by me and an authorized representative of Kelly Services, referencing this Agreement and stating an intent to revoke or modify it. I understand that this Agreement shall survive the termination of my employment and that, should Kelly Services rehire me at any time subsequent to any termination of my employment, this Agreement shall remain in full effect for subsequent periods of employment.

16. Savings Clause & Conformity Clause. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

17. Headings. The headings in this Agreement are for convenience only. The headings form no part of this Agreement and shall not affect its interpretation.

18. Acknowledgement. I acknowledge that I have carefully read this Agreement, that I understand its terms, and that I have entered into the Agreement voluntarily and not in reliance on any promises or other representations by Kelly Services.

EMPLOYEE/CANDIDATE	**KELLY SERVICES, INC.**
T Noye:8166	Nina M. Ramsey
Signature	Signature of Authorized Representative
T J Noye	Nina Ramsey / SVP and Chief Human Resources Officer
Print Name	Print Name / Title
2/12/2015	02/12/2015
Date	Date

FORM NLRB-501

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 04-CA-171036	Date Filed 7/14/16

INSTRUCTIONS

File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Kelly Services, Inc.

b. Number of workers employed
Over 1,000

c. Address (street, city, state, ZIP code)
Kelly Services, Inc.
999 West Big Beaver Road
Troy, MI 48084

d. Employer Representative
Gibley and McWilliams, P.C.
Joseph W. Gibley
Speros J. Kokonos
524 N. Providence Road
Media, PA 19063
(610) 627-9500
(610) 627-2400 (fax)

Seyfarth Shaw LLP

Gerald Maatman
Pamela Q. Devata
131 S. Dearborn St, Ste. 2400
Chicago, IL 60603
(312) 460-5965

Laura J. Maechtlen
Michael W. Stevens
Shireen Y. Wetmore
560 Mission Street, Ste. 3100
San Francisco, CA 94105
(415) 397-2823

e. Telephone No.
248-362-4444
Fax: No: Unknown

f. Type of Establishment (factory, mine, wholesaler, etc.)
Temporary employment agency

g. Identify principal product or service
Providing employees for other businesses

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsection (1) of the Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since in or around February 2015, and on a continuing basis, Kelly Services, Inc. ("Kelly"), by and through its agents, has violated Section 8(a)(1) of the Act by maintaining arbitration agreements which interfere with applicants' and employees' Section 7 rights. The arbitration agreements also unlawfully purport to restrict the remedies available in charges filed with the National Labor Relations Board.

Since in or around February 2016, and on a continuing basis, Kelly has violated Section(a)(1) of the Act by attempting to enforce its unlawful arbitration agreements to prevent its applicants/employees from exercising their Section 7 rights to participate in class action litigation in the U.S. District Court for the Middle District of Pennsylvania.

By the above and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
T Jason Noye

4a. Address (street and number, city, state and ZIP code)
2060 Union Church Road
Seven Valley, PA 17360

4b. Telephone No:
Contact through counsel
Fax: No:
Contact through counsel

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization. N/A

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By  Title: Staff attorney

Signature of representative or person making charge

Address: Marielle Macher, Esq.
Community Justice Project
118 Locust Street
Harrisburg, PA 17101

Telephone No.: 717-236-9486, ext. 214

Fax No . 717-233-4088

Date: July 14, 2016

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

Download
NLRB
Mobile App

July 15, 2016

Kelly Services, Inc.
3 Montage Mountain Road
Moosic, PA 18507-1754

Re: Kelly Services, Inc.
Case 04-CA-171036

Dear Sir or Madam:

Enclosed is a copy of the first amended charge that has been filed in this case.

Investigator: This charge is being investigated by Field Attorney Lea Alvo-Sadiky whose telephone number is (215)597-7630. If the agent is not available, you may contact Supervisory Examiner CARA L. FIES-KELLER whose telephone number is (215)597-7636.

Presentation of Your Evidence: As you know, we seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations in the first amended charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Procedures: Your right to representation, the means of presenting evidence, and a description of our procedures, including how to submit documents, was described in the letter sent to you with the original charge in this matter. If you have any questions, please contact the Board agent.

Very truly yours,

Dennis P. Walsh

DENNIS P. WALSH
Regional Director

Enclosure: Copy of first amended charge

cc: Joseph Gibley, Esquire
Gibley and McWilliams, P.C.
131 South Dearborn Street
Suite 2400
Chicago, IL 60603

Gerald L. Maatman, Esquire
Seyfarth Shaw LLP
131 S. Dearborn Street, Suite 2400
Chicago, IL 60603

Karla E. Sanchez, Attorney
Seyfarth Shaw LLP
131 South Dearborn Street
Suite 2400
Chicago, IL 60603

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KELLY SERVICES, INC. Charged Party and **MARIELLE MACHER** Charging Party	**Case 04-CA-171036**

AFFIDAVIT OF SERVICE OF FIRST AMENDED CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 15, 2016**,** I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Joseph Gibley, Esquire
Gibley and McWilliams, P.C.
131 South Dearborn Street
Suite 2400
Chicago, IL 60603

Karla E. Sanchez, Attorney
Seyfarth Shaw LLP
131 South Dearborn Street
Suite 2400
Chicago, IL 60603

Gerald L. Maatman JR., Esquire
Seyfarth Shaw LLP
131 S. Dearborn Street, Suite 2400
Chicago, IL 60603

Kelly Services, Inc.
3 Montage Mountain Road
Moosic, PA 18507-1754

July 15, 2016

Janet T. Jackson,
Designated Agent of NLRB

/s/ Janet T. Jackson

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

Download
NLRB
Mobile App

July 15, 2016

Marielle Macher, Esquire
Community Justice Project
c/o T. Jason Noye
118 Locust Street
Harrisburg, PA 17101-1414

Re: Kelly Services, Inc.
Case 04-CA-171036

Dear Ms. Macher:

We have docketed the first amended charge that you filed in this case.

Investigator: This charge is being investigated by Field Attorney Lea Alvo-Sadiky whose telephone number is (215)597-7630. If the agent is not available, you may contact Supervisory Examiner CARA L. FIES-KELLER whose telephone number is (215)597-7636.

Presentation of Your Evidence: As the party who filed the charge in this case, it is your responsibility to meet with the Board agent to provide a sworn affidavit, or provide other witnesses to provide sworn affidavits, and to provide relevant documents within your possession. If you have additional evidence regarding the allegations in the first amended charge and you have not yet scheduled a date and time for the Board agent to obtain that evidence, please contact the Board agent to arrange to present that evidence. If you fail to cooperate in promptly presenting your evidence, your charge may be dismissed.

Procedures: Your right to representation, the means of presenting evidence, and a description of our procedures, including how to submit documents, was described in the letter sent to you with the original charge in this matter. If you have any questions, please contact the Board agent.

Very truly yours,

Dennis P. Walsh

DENNIS P. WALSH
Regional Director

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 04
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

August 31, 2016

Marielle Macher, Esquire
c/o T Jason Noye
Community Justice Project
118 Locust Street
Harrisburg, PA 17101-1414

Re: Kelly Services, Inc.
Case 04-CA-171036

Dear Ms. Macher:

We have carefully investigated and considered your charge that Kelly Services, Inc. has violated the National Labor Relations Act.

Decision to Partially Dismiss: Based on that investigation, I have decided to dismiss the portion of the charge alleging that the Employer violated Section 8(a)(1) of the Act by attempting to enforce an unlawful mandatory arbitration agreement which prevents applicants/employees from exercising their Section 7 rights to participate in class action litigation in the U.S. District Court for the Middle District of Pennsylvania, because there is insufficient evidence to establish a violation of the Act. All other portions of the charge remain pending.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **E-File Documents,** enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **Wednesday, September 14, 2016**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than **Tuesday, September 13, 2016. If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before Wednesday, September 14, 2016.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after **Wednesday, September 14, 2016**, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Dennis P. Walsh

DENNIS P. WALSH
Regional Director

Enclosure

cc: Gerald L. Maatman, Esquire
Karla E. Sanchez, Esquire
Seyfarth Shaw LLP
131 S. Dearborn Street, Suite 2400
Chicago, IL 60603

Joseph Gibley, Esquire
Gibley and McWilliams, P.C.
524 N. Providence Road
Media, PA 19063

Kelly Services, Inc.
3 Montage Mountain Road
Moosic, PA 18507-1754

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

Kelly Services, Inc.

Case Name(s).

Case No. 04-CA-171036

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

(Signature)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

September 20, 2016

MARIELLE MACHER, ESQ.
COMMUNITY JUSTICE PROJECT
C/O T JASON NOYE
118 LOCUST ST
HARRISBURG, PA 17101-1414

Re: Kelly Services, Inc.
Case 04-CA-171036

Dear Ms. Macher:

We have received your appeal and accompanying material. We will assign it for processing in accordance with Agency procedures, which include review of the investigatory file and your appeal in light of current Board law. We will notify you and all other involved parties as soon as possible of our decision.

Sincerely,

Richard F. Griffin, Jr.
General Counsel

Mark E. Arbesfeld

By: _____
Mark E. Arbesfeld, Acting Director
Office of Appeals

cc: DENNIS P. WALSH
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
615 CHESTNUT ST STE 710
PHILADELPHIA, PA 19106-4413

JOSEPH GIBLEY, ESQ.
GIBLEY AND MCWILLIAMS, P.C.
524 N PROVIDENCE RD
MEDIA, PA 19063-3056

GERALD L. MAATMAN, ESQ.
SEYFARTH SHAW LLP
131 S DEARBORN STR STE 2400
CHICAGO, IL 60603

KARLA E. SANCHEZ, ESQ.
SEYFARTH SHAW LLP
131 S DEARBORN ST STE 2400
CHICAGO, IL 60603

KELLY SERVICES, INC.
3 MONTAGE MOUNTAIN RD
MOOSIC, PA 18507-1754

cl

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

November 21, 2016

MARIELLE MACHER, ESQ.
COMMUNITY JUSTICE PROJECT
C/O T JASON NOYE
118 LOCUST ST
HARRISBURG, PA 17101-1414

Re: Kelly Services, Inc.
Case 04-CA-171036

Dear Ms. Macher:

This Office has carefully considered your appeal from the Regional Director's partial dismissal of the instant charge. We agree with the Regional Director's determination to partially dismiss the charge and deny the appeal substantially for the reasons set forth in his letter dated August 31, 2016.

Under the terms of the National Labor Relations Act, supervisors are generally not covered under the protections of the Act. The existence of any one of the enumerated powers in Section 2(11) of the Act, when combined with independent judgment, suffices to confer supervisory status. See e.g., *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006). These enumerated powers include the authority to, among other things, discharge, assign work, reward or discipline other employees, or responsibly to direct them. The evidence established that the Weekend Nights Operations Supervisor position with Johnson & Johnson Services, Inc., as advertised through Kelly Services, Inc., the Employer herein, is a supervisory position as defined in Section 2(11) of the Act. Consequently, the alleged discriminatee, as a supervisor, is not protected by the Act. Thus, in a separate legal matter, the Employer's motion to the U.S. District Court for the Middle District of Pennsylvania to compel arbitration of the individual's claims against Kelly Services, Inc., is not violative of the Act as alleged.

Accordingly, further proceedings on the dismissed portion of the captioned matter are unwarranted.

Sincerely,

Richard F. Griffin, Jr.
General Counsel

By: _____
Mark E. Arbesfeld, Acting Director
Office of Appeals

cc: DENNIS P. WALSH
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
615 CHESTNUT ST STE 710
PHILADELPHIA, PA 19106-4413

JOSEPH GIBLEY, ESQ.
GIBLEY AND MCWILLIAMS, PC
524 N PROVIDENCE RD
MEDIA, PA 19063-3056

KELLY SERVICES, INC.
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131 S DEARBORN ST STE 2400
CHICAGO, IL 60603

GERALD L. MAATMAN, ESQ.
SEYFARTH SHAW LLP
131 S. DEARBORN ST STE 2400
CHICAGO, IL 60603

kf

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.

and **Case 04-CA-171036**

T JASON FOYE, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by T Jason Foye, an Individual (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Kelly Services, Inc. (Respondent) has violated the Act as described below.

1. (a) The charge in this proceeding was filed by the Charging Party on March 4, 2016, and a copy was served on Respondent by U.S. mail on March 4, 2016.

(b) The amended charge in this proceeding was filed by the Charging Party on July 14, 2016, and a copy was served on Respondent by U.S. mail on July 15, 2016.

2. (a) At all material times, Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers.

(b) During the past 12 months, in conducting its business operations described above in subparagraph (a), Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. (a) Since at least September 5, 2015, and at all material times, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to

my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

(b) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring employees to waive their right to maintain class or collective actions in all forums,

whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment.

(c) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

4. By the conduct described above in paragraph 3, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

5. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an Order requiring that Respondent rescind the provisions of its Arbitration Agreement set forth in paragraph 3(a) and notify all employees employed by Respondent of the rescission.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before January 11, 2017 or postmarked on or before January 10, 2017.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed,

or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT at **10:00 a.m.** on **April 3, 2017**, in a hearing room of the National Labor Relations Board, Region Four, 615 Chestnut Street, Suite 710, Philadelphia, Pennsylvania, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Signed at Philadelphia, Pennsylvania this 28th day of December, 2016.

DENNIS P. WALSH
Regional Director, Fourth Region
National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC., Case No. 04-CA-171036

v.

T JASON FOYE[1], an Individual,

ANSWER TO COMPLAINT

Pursuant to Section 102.20 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Respondent Kelly Services, Inc. ("Kelly") submits this Answer to the Complaint in the above-captioned matter and states as follows:

COMPLAINT ¶1:

(a) The charge in this proceeding was filed by the Charging Party on March 4, 2016, and a copy was served on Respondent by U.S. mail on March 4, 2016.

(b) The amended charge in this proceeding was filed by the Charging Party on July 14, 2016, and a copy was served on Respondent by U.S. mail on July 15, 2016.

ANSWER:

(a) Kelly admits that the charge purports to have been filed by the Charging Party's counsel on March 4, 2016. Kelly admits that a copy of the charge was mailed via U.S. mail to it on March 4, 2016. Kelly denies any remaining allegations set forth in Paragraph 1(a) of the Complaint.

(b) Kelly admits that an amended charge purports to have been filed by the Charging Party's counsel on July 14, 2016. Kelly admits that a copy of the charge was mailed to it via

[1] The Charging Party's last name is misspelled in the Complaint. The Charging Party's last name is "Noye."

U.S. mail on July 15, 2016. Kelly denies any remaining allegations set forth in Paragraph 1(b) of the Complaint.

COMPLAINT ¶2:

(a) At all material times, Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers.

(b) During the past 12 months, in conducting its business operations described above in subparagraph (a), Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

ANSWER:

(a) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that it is a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey. Kelly denies the remaining allegations set forth in Paragraph 2(a) of the Complaint.

(b) Kelly admits the allegations set forth in Paragraph 2(b) of the Complaint.

(c) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

COMPLAINT ¶3:

(a) Since at least September 5, 2015, and at all material times, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement**. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim

for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims. (Emphasis in original)**

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

(b) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring

employees to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment.

(c) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

ANSWER:

(a) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that for some period of time, it maintained a Dispute Resolution and Mutual Agreement to Binding Arbitration document ("Arbitration Agreement"), which included the excerpts set forth in Paragraph 3(a) of the Complaint. Kelly denies the remaining allegations set forth in Paragraph 3(a) of the Complaint.

(b) Kelly denies the allegations set forth in Paragraph 3(b) of the Complaint.

(c) Kelly denies the allegations set forth in Paragraph 3(c) of the Complaint.

COMPLAINT ¶4:

By the conduct described above in paragraph 3, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

ANSWER:

Kelly denies the allegations set forth in Paragraph 4 of the Complaint.

COMPLAINT ¶5:

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER:

Kelly denies the allegations set forth in Paragraph 5 of the Complaint.

AFFIRMATIVE AND OTHER DEFENSES

1. The Complaint fails to state a claim for which relief may be granted.

2. The Arbitration Agreement is enforceable under the Federal Arbitration Act ("FAA").

3. The Board's precedent in *e.g. D.R. Horton*, 357 NLRB No. 184 (2012) and *Murphy Oil USA*, 361 NLRB No. 72 (2014) conflicts with and is preempted by the FAA.

4. The NLRA creates no substantive right to employees to insist on class-type treatment of non-NLRA claims.

5. The Board's requested remedies are precluded by the FAA and federal policy favoring arbitration of disputes. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

6. The Charging Party was not required, as a condition of his employment with Kelly, to sign the Arbitration Agreement.

7. The Board's position on class action waivers violates Section 9(a) of the Act.

Kelly specifically reserves the right to amend this Answer to add or delete affirmative defenses as warranted.

DATED: January 11, 2017

Respectfully submitted,

KELLY SERVICES, INC.

By: _____
One of Its Attorneys

Gerald L. Maatman, Jr.
gmaatman@seyfarth.com
Karla E. Sanchez
ksanchez@seyfarth.com

SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
Telephone: (312) 460-5000
Facsimile: (312) 460-7000

CERTIFICATE OF SERVICE

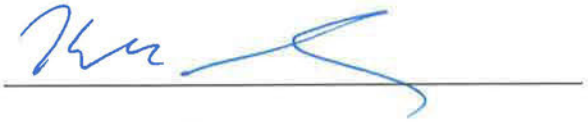
I, the undersigned, certify on the date indicated above that I served the above-entitled document upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Dennis P. Walsh (E-Service)
Regional Director
National Labor Relations Board
Region 4
615 Chestnut St Ste 710
Philadelphia, PA 19106

Barbara Mann (E-Service)
Lea Alvo-Sadiky (E-Service)
Board Agent
National Labor Relations Board
Region 4
615 Chestnut St Ste 710
Philadelphia, PA 19106

Marielle Macher, Esq. (via FedEx)
Community Justice Project
c/o T. Jason Noye
118 Locust Street
Harrisburg, PA 17101

Joseph Gibley, Esq. (via FedEx)
Gibley and McWilliams, P.C.
524 N. Providence Road
Media, PA 19063-3056



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC., Case No. 04-CA-171036

v.

T JASON FOYE[1], an Individual,

AMENDED ANSWER TO COMPLAINT

Pursuant to Sections 102.20 and 102.23 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Respondent Kelly Services, Inc. ("Kelly") submits this Amended Answer to the Complaint in the above-captioned matter and states as follows:

COMPLAINT ¶1:

(a) The charge in this proceeding was filed by the Charging Party on March 4, 2016, and a copy was served on Respondent by U.S. mail on March 4, 2016.

(b) The amended charge in this proceeding was filed by the Charging Party on July 14, 2016, and a copy was served on Respondent by U.S. mail on July 15, 2016.

ANSWER:

(a) Kelly admits that the charge purports to have been filed by the Charging Party's counsel on March 4, 2016. Kelly admits that a copy of the charge was mailed via U.S. mail to it on March 4, 2016. Kelly denies any remaining allegations set forth in Paragraph 1(a) of the Complaint.

(b) Kelly admits that an amended charge purports to have been filed by the Charging Party's counsel on July 14, 2016. Kelly admits that a copy of the charge was mailed to it via

[1] The Charging Party's last name is misspelled in the Complaint. The Charging Party's last name is "Noye."

U.S. mail on July 15, 2016. Kelly denies any remaining allegations set forth in Paragraph 1(b) of the Complaint.

COMPLAINT ¶2:

(a) At all material times, Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers.

(b) During the past 12 months, in conducting its business operations described above in subparagraph (a), Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

ANSWER:

(a) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that it is a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey. Kelly denies the remaining allegations set forth in Paragraph 2(a) of the Complaint.

(b) Kelly admits the allegations set forth in Paragraph 2(b) of the Complaint.

(c) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

COMPLAINT ¶3:

(a) Since at least September 5, 2015, and at all material times, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement**. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim

for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims. (Emphasis in original)**

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

(b) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring

employees to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment.

(c) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

ANSWER:

(a) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that for some period of time, it maintained a Dispute Resolution and Mutual Agreement to Binding Arbitration document ("Arbitration Agreement"), which included the excerpts set forth in Paragraph 3(a) of the Complaint. Kelly denies the remaining allegations set forth in Paragraph 3(a) of the Complaint.

(b) Kelly denies the allegations set forth in Paragraph 3(b) of the Complaint.

(c) Kelly denies the allegations set forth in Paragraph 3(c) of the Complaint.

COMPLAINT ¶4:

By the conduct described above in paragraph 3, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

ANSWER:

Kelly denies the allegations set forth in Paragraph 4 of the Complaint.

COMPLAINT ¶5:

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER:

Kelly denies the allegations set forth in Paragraph 5 of the Complaint.

AFFIRMATIVE AND OTHER DEFENSES

1. The Complaint fails to state a claim for which relief may be granted.

2. The Arbitration Agreement is enforceable under the Federal Arbitration Act ("FAA").

3. The Board's precedent in *e.g. D.R. Horton*, 357 NLRB No. 184 (2012) and *Murphy Oil USA*, 361 NLRB No. 72 (2014) conflicts with and is preempted by the FAA.

4. The NLRA creates no substantive right to employees to insist on class-type treatment of non-NLRA claims.

5. The Board's requested remedies are precluded by the FAA and federal policy favoring arbitration of disputes. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

6. The Board's position on class action waivers violates Section 9(a) of the Act.

Kelly specifically reserves the right to amend this Amended Answer to add or delete affirmative defenses as warranted.

DATED: January 12, 2017

Respectfully submitted,

KELLY SERVICES, INC.

By: Gerald L. Maatman, Jr.
One of Its Attorneys

Gerald L. Maatman, Jr.
gmaatman@seyfarth.com
Karla E. Sanchez
ksanchez@seyfarth.com

SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
Telephone: (312) 460-5000
Facsimile: (312) 460-7000

CERTIFICATE OF SERVICE

I, the undersigned, certify on the date indicated above that I served the above-entitled document upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Dennis P. Walsh (E-Service)
Regional Director
National Labor Relations Board
Region 4
615 Chestnut St Ste 710
Philadelphia, PA 19106

Barbara Mann (E-Service)
Lea Alvo-Sadiky (E-Service)
Board Agent
National Labor Relations Board
Region 4
615 Chestnut St Ste 710
Philadelphia, PA 19106

Marielle Macher, Esq. (via FedEx)
Community Justice Project
c/o T. Jason Noye
118 Locust Street
Harrisburg, PA 17101

Joseph Gibley, Esq. (via FedEx)
Gibley and McWilliams, P.C.
524 N. Providence Road
Media, PA 19063-3056

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.

and **Case 04-CA-171036**

T JASON NOYE, an Individual

STIPULATION OF FACTS, JOINT MOTION TO SUBMIT CASE ON STIPULATION AND JOINT MOTION REQUESTING PERMISSION TO FORGO SUBMISSION OF SHORT POSITION STATEMENTS

Counsel for the General Counsel of the National Labor Relations Board (General Counsel), Respondent Kelly Services, Inc. (Respondent), and Charging Party T Jason Noye (Charging Party), collectively referred to as "the Parties," hereby enter this Stipulation of Facts and jointly petition the Administrative Law Judge (ALJ), in order to avoid unnecessary costs and delay, to exercise his powers under Section 102.35(a)(9) of the Rules and Regulations of the National Labor Relations Board (Board), and decide this case on stipulation.

The Parties further request that the ALJ permit them to forgo the submission of short statements of position as described in Section 102.35(a)(9) of the Board's Rules and Regulations. The parties request instead that they be permitted to file briefs.

1. The Parties agree that this Stipulation of Facts, with attached exhibits described herein, constitutes the entire record in this case and that no oral testimony is necessary or desired by the Parties. In the event the ALJ grants this joint petition, the Parties request that the ALJ set a date for the filing of briefs at least 45 days out from the approval of this petition.

2. Upon the original, and amended charge in Case 04-CA-171036 filed by the Charging Party on March 4, 2016, and July 14, 2016 respectively (attached as ***Joint Exhibits 1 and 2***), receipt of which is hereby acknowledged by Respondent, the General Counsel of the Board, by the Regional Director for Region 4, acting pursuant to the authority granted in Section 10(b) of the Act, as amended, 29 U.S.C. §151, *et seq.*, and Section 102.15 of the Board's Rules and Regulations, issued a Complaint and Notice of Hearing (attached as ***Joint Exhibit 3***) on December 28, 2016 (Complaint). True copies of the Complaint were duly served by certified mail upon Respondent and upon the Charging Party on December 28, 2016. Respondent's Answer to the Complaint and Amended Answer to the Complaint (attached as ***Joint Exhibits 4 and 5***) were duly served upon the Regional Director for Region 4 and the Charging Party on January 11 and 12, 2017 respectively.

3. Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers. In conducting its operations during the past 12-month period, Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement) (attached as ***Joint Exhibit 6***), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages,

wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

5. All documents attached as exhibits are true and correct copies of the documents described. The parties agree to the authenticity of the exhibits.

STATEMENT OF ISSUES

Based on the foregoing factual stipulations, the Parties agree that the legal issues to be resolved in this matter are whether Respondent's maintenance of the Arbitration Agreement

described above in Paragraph 4 violates Section 8(a)(1) of the Act because it: (i) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment; and (ii) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

Signed: _____ Date: 3/30/17

Lea F. Alvo-Sadiky, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 4
615 Chestnut Street, Suite 710
Philadelphia, PA 19106

Signed: _____ Date: 3/30/2017

Gerald L. Maatman, Jr., Esq.
Counsel for Respondent
Seyfarth Shaw LLP
233 South Wacker Drive
Suite 8000
Chicago, IL 60606

Signed: _____ Date: 3/30/17

Marielle Macher, Esq.
Counsel for the Charging Party
Community Justice Project
118 Locust Street
Harrisburg, PA 17101-1414

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.

and **Case 04-CA-171036**

T JASON NOYE, an Individual

JOINT EXHIBITS

FORM NLRB-501

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
04-CA-171036	3/4/167

INSTRUCTIONS

File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer		b. Number of workers employed
Kelly Services, Inc.		Over 1,000
c. Address (street, city, state, ZIP code)	d. Employer Representative	e. Telephone No.
Kelly Services, Inc. 999 West Big Beaver Road Troy, MI 48084	Gibley and McWilliams, P.C. Joseph W. Gibley Speros J. Kokonos 524 N. Providence Road Media, PA 19063 (610) 627-9500 (610) 627-2400 (fax) Seyfarth Shaw LLP Gerald Maatman Pamela Q. Devata 131 S. Dearborn St, Ste. 2400 Chicago, IL 60603 (312) 460-5965 Laura J. Maechtlen Michael W. Stevens Shireen Y. Wetmore 560 Mission Street, Ste. 3100 San Francisco, CA 94105 (415) 397-2823	248-362-4444 Fax: No: Unknown
f. Type of Establishment (factory, mine, wholesaler, etc.)	g. Identify principal product or service	
Temporary employment agency	Providing employees for other businesses	

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsection (1) of the Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since in or around February 2015, and on a continuing basis, Kelly Services, Inc. ("Kelly"), by and through its agents, has violated Section 8(a)(1) of the Act by maintaining arbitration agreements which interfere with applicants' and employees' Section 7 rights.

Since in or around February 2016, and on a continuing basis, Kelly has violated Section(a)(1) of the Act by attempting to enforce its unlawful arbitration agreements to prevent its applicants/employees from exercising their Section 7 rights to participate in class action litigation in the U.S. District Court for the Middle District of Pennsylvania.

By the above and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

T Jason Noye

4a. Address (street and number, city, state and ZIP code)	4b. Telephone No:
2060 Union Church Road Seven Valley, PA 17360	Contact through counsel Fax: No: Contact through counsel

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization. N/A

JOINT EXHIBIT 1

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Title: Staff attorney
Signature of representative or person making charge

Address: Marielle Macher, Esq.
Community Justice Project
118 Locust Street
Harrisburg, PA 17101

Telephone No.: 717-236-9486, ext. 214

Date: Mar. 4, 2016

Fax No.: 717-233-4088

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

FORM NLRB-501

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 04-CA-171036	Date Filed 7/14/16

INSTRUCTIONS

File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer		b. Number of workers employed
Kelly Services, Inc.		Over 1,000
c. Address (street, city, state, ZIP code) Kelly Services, Inc. 999 West Big Beaver Road Troy, MI 48084	d. Employer Representative Gibley and McWilliams, P.C. Joseph W. Gibley Speros J. Kokonos 524 N. Providence Road Media, PA 19063 (610) 627-9500 (610) 627-2400 (fax) Seyfarth Shaw LLP Gerald Maatman Pamela Q. Devata 131 S. Dearborn St, Ste. 2400 Chicago, IL 60603 (312) 460-5965 Laura J. Maechtlen Michael W. Stevens Shireen Y. Wetmore 560 Mission Street, Ste. 3100 San Francisco, CA 94105 (415) 397-2823	e. Telephone No. 248-362-4444 Fax: No: Unknown
f. Type of Establishment (factory, mine, wholesaler, etc.) Temporary employment agency	g. Identify principal product or service Providing employees for other businesses	

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsection (1) of the Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since in or around February 2015, and on a continuing basis, Kelly Services, Inc. ("Kelly"), by and through its agents, has violated Section 8(a)(1) of the Act by maintaining arbitration agreements which interfere with applicants' and employees' Section 7 rights. The arbitration agreements also unlawfully purport to restrict the remedies available in charges filed with the National Labor Relations Board.

Since in or around February 2016, and on a continuing basis, Kelly has violated Section(a)(1) of the Act by attempting to enforce its unlawful arbitration agreements to prevent its applicants/employees from exercising their Section 7 rights to participate in class action litigation in the U.S. District Court for the Middle District of Pennsylvania.

By the above and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
T Jason Noye

4a. Address (street and number, city, state and ZIP code)	4b. Telephone No:
2060 Union Church Road Seven Valley, PA 17360	Contact through counsel Fax: No: Contact through counsel

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization. N/A

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By  Title: Staff attorney

Signature of representative or person making charge

Address: Marielle Macher, Esq.
Community Justice Project
118 Locust Street
Harrisburg, PA 17101

Telephone No.: 717-236-9486, ext. 214

Fax No . 717-233-4088

Date: July 14, 2016

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.

and **Case 04-CA-171036**

T JASON FOYE, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by T Jason Foye, an Individual (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Kelly Services, Inc. (Respondent) has violated the Act as described below.

1. (a) The charge in this proceeding was filed by the Charging Party on March 4, 2016, and a copy was served on Respondent by U.S. mail on March 4, 2016.

(b) The amended charge in this proceeding was filed by the Charging Party on July 14, 2016, and a copy was served on Respondent by U.S. mail on July 15, 2016.

2. (a) At all material times, Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers.

(b) During the past 12 months, in conducting its business operations described above in subparagraph (a), Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. (a) Since at least September 5, 2015, and at all material times, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement**. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to

my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

(b) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring employees to waive their right to maintain class or collective actions in all forums,

whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment.

(c) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

4. By the conduct described above in paragraph 3, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

5. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an Order requiring that Respondent rescind the provisions of its Arbitration Agreement set forth in paragraph 3(a) and notify all employees employed by Respondent of the rescission.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before January 11, 2017 or postmarked on or before January 10, 2017.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed,

or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT at **10:00 a.m.** on **April 3, 2017**, in a hearing room of the National Labor Relations Board, Region Four, 615 Chestnut Street, Suite 710, Philadelphia, Pennsylvania, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Signed at Philadelphia, Pennsylvania this 28th day of December, 2016.

DENNIS P. WALSH
Regional Director, Fourth Region
National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC., Case No. 04-CA-171036

v.

T JASON FOYE[1], an Individual,

ANSWER TO COMPLAINT

Pursuant to Section 102.20 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Respondent Kelly Services, Inc. ("Kelly") submits this Answer to the Complaint in the above-captioned matter and states as follows:

COMPLAINT ¶1:

(a) The charge in this proceeding was filed by the Charging Party on March 4, 2016, and a copy was served on Respondent by U.S. mail on March 4, 2016.

(b) The amended charge in this proceeding was filed by the Charging Party on July 14, 2016, and a copy was served on Respondent by U.S. mail on July 15, 2016.

ANSWER:

(a) Kelly admits that the charge purports to have been filed by the Charging Party's counsel on March 4, 2016. Kelly admits that a copy of the charge was mailed via U.S. mail to it on March 4, 2016. Kelly denies any remaining allegations set forth in Paragraph 1(a) of the Complaint.

(b) Kelly admits that an amended charge purports to have been filed by the Charging Party's counsel on July 14, 2016. Kelly admits that a copy of the charge was mailed to it via

[1] The Charging Party's last name is misspelled in the Complaint. The Charging Party's last name is "Noye."

U.S. mail on July 15, 2016. Kelly denies any remaining allegations set forth in Paragraph 1(b) of the Complaint.

COMPLAINT ¶2:

(a) At all material times, Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers.

(b) During the past 12 months, in conducting its business operations described above in subparagraph (a), Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

ANSWER:

(a) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that it is a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey. Kelly denies the remaining allegations set forth in Paragraph 2(a) of the Complaint.

(b) Kelly admits the allegations set forth in Paragraph 2(b) of the Complaint.

(c) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

COMPLAINT ¶3:

(a) Since at least September 5, 2015, and at all material times, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement**. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim

for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims. (Emphasis in original)**

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

(b) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring

employees to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment.

(c) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

ANSWER:

(a) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that for some period of time, it maintained a Dispute Resolution and Mutual Agreement to Binding Arbitration document ("Arbitration Agreement"), which included the excerpts set forth in Paragraph 3(a) of the Complaint. Kelly denies the remaining allegations set forth in Paragraph 3(a) of the Complaint.

(b) Kelly denies the allegations set forth in Paragraph 3(b) of the Complaint.

(c) Kelly denies the allegations set forth in Paragraph 3(c) of the Complaint.

COMPLAINT ¶4:

By the conduct described above in paragraph 3, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

ANSWER:

Kelly denies the allegations set forth in Paragraph 4 of the Complaint.

COMPLAINT ¶5:

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER:

Kelly denies the allegations set forth in Paragraph 5 of the Complaint.

AFFIRMATIVE AND OTHER DEFENSES

1. The Complaint fails to state a claim for which relief may be granted.

2. The Arbitration Agreement is enforceable under the Federal Arbitration Act ("FAA").

3. The Board's precedent in *e.g. D.R. Horton*, 357 NLRB No. 184 (2012) and *Murphy Oil USA*, 361 NLRB No. 72 (2014) conflicts with and is preempted by the FAA.

4. The NLRA creates no substantive right to employees to insist on class-type treatment of non-NLRA claims.

5. The Board's requested remedies are precluded by the FAA and federal policy favoring arbitration of disputes. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

6. The Charging Party was not required, as a condition of his employment with Kelly, to sign the Arbitration Agreement.

7. The Board's position on class action waivers violates Section 9(a) of the Act.

Kelly specifically reserves the right to amend this Answer to add or delete affirmative defenses as warranted.

DATED: January 11, 2017

Respectfully submitted,

KELLY SERVICES, INC.

By: _____
One of Its Attorneys

Gerald L. Maatman, Jr.
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Karla E. Sanchez
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131 South Dearborn Street
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CERTIFICATE OF SERVICE

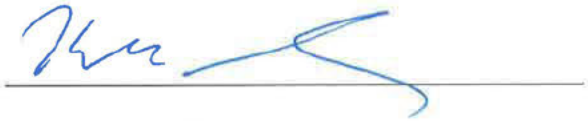
I, the undersigned, certify on the date indicated above that I served the above-entitled document upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Dennis P. Walsh (E-Service)
Regional Director
National Labor Relations Board
Region 4
615 Chestnut St Ste 710
Philadelphia, PA 19106

Barbara Mann (E-Service)
Lea Alvo-Sadiky (E-Service)
Board Agent
National Labor Relations Board
Region 4
615 Chestnut St Ste 710
Philadelphia, PA 19106

Marielle Macher, Esq. (via FedEx)
Community Justice Project
c/o T. Jason Noye
118 Locust Street
Harrisburg, PA 17101

Joseph Gibley, Esq. (via FedEx)
Gibley and McWilliams, P.C.
524 N. Providence Road
Media, PA 19063-3056



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC., Case No. 04-CA-171036

v.

T JASON FOYE[1], an Individual,

AMENDED ANSWER TO COMPLAINT

Pursuant to Sections 102.20 and 102.23 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Respondent Kelly Services, Inc. ("Kelly") submits this Amended Answer to the Complaint in the above-captioned matter and states as follows:

COMPLAINT ¶1:

(a) The charge in this proceeding was filed by the Charging Party on March 4, 2016, and a copy was served on Respondent by U.S. mail on March 4, 2016.

(b) The amended charge in this proceeding was filed by the Charging Party on July 14, 2016, and a copy was served on Respondent by U.S. mail on July 15, 2016.

ANSWER:

(a) Kelly admits that the charge purports to have been filed by the Charging Party's counsel on March 4, 2016. Kelly admits that a copy of the charge was mailed via U.S. mail to it on March 4, 2016. Kelly denies any remaining allegations set forth in Paragraph 1(a) of the Complaint.

(b) Kelly admits that an amended charge purports to have been filed by the Charging Party's counsel on July 14, 2016. Kelly admits that a copy of the charge was mailed to it via

[1] The Charging Party's last name is misspelled in the Complaint. The Charging Party's last name is "Noye."

U.S. mail on July 15, 2016. Kelly denies any remaining allegations set forth in Paragraph 1(b) of the Complaint.

COMPLAINT ¶2:

(a) At all material times, Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers.

(b) During the past 12 months, in conducting its business operations described above in subparagraph (a), Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

ANSWER:

(a) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that it is a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey. Kelly denies the remaining allegations set forth in Paragraph 2(a) of the Complaint.

(b) Kelly admits the allegations set forth in Paragraph 2(b) of the Complaint.

(c) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

COMPLAINT ¶3:

(a) Since at least September 5, 2015, and at all material times, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement**. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim

for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims. (Emphasis in original)**

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

(b) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring

employees to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment.

(c) The Arbitration Agreement referenced above in subparagraph 3(a) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

ANSWER:

(a) Kelly lacks knowledge or information sufficient to form a belief about what the Region believes to be "at all material times." Kelly admits that for some period of time, it maintained a Dispute Resolution and Mutual Agreement to Binding Arbitration document ("Arbitration Agreement"), which included the excerpts set forth in Paragraph 3(a) of the Complaint. Kelly denies the remaining allegations set forth in Paragraph 3(a) of the Complaint.

(b) Kelly denies the allegations set forth in Paragraph 3(b) of the Complaint.

(c) Kelly denies the allegations set forth in Paragraph 3(c) of the Complaint.

COMPLAINT ¶4:

By the conduct described above in paragraph 3, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

ANSWER:

Kelly denies the allegations set forth in Paragraph 4 of the Complaint.

COMPLAINT ¶5:

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER:

Kelly denies the allegations set forth in Paragraph 5 of the Complaint.

AFFIRMATIVE AND OTHER DEFENSES

1. The Complaint fails to state a claim for which relief may be granted.

2. The Arbitration Agreement is enforceable under the Federal Arbitration Act ("FAA").

3. The Board's precedent in *e.g. D.R. Horton*, 357 NLRB No. 184 (2012) and *Murphy Oil USA*, 361 NLRB No. 72 (2014) conflicts with and is preempted by the FAA.

4. The NLRA creates no substantive right to employees to insist on class-type treatment of non-NLRA claims.

5. The Board's requested remedies are precluded by the FAA and federal policy favoring arbitration of disputes. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

6. The Board's position on class action waivers violates Section 9(a) of the Act.

Kelly specifically reserves the right to amend this Amended Answer to add or delete affirmative defenses as warranted.

DATED: January 12, 2017

Respectfully submitted,

KELLY SERVICES, INC.

By: Gerald L. Maatman, Jr.
One of Its Attorneys

Gerald L. Maatman, Jr.
gmaatman@seyfarth.com
Karla E. Sanchez
ksanchez@seyfarth.com

SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
Telephone: (312) 460-5000
Facsimile: (312) 460-7000

CERTIFICATE OF SERVICE

I, the undersigned, certify on the date indicated above that I served the above-entitled document upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Dennis P. Walsh (E-Service)
Regional Director
National Labor Relations Board
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615 Chestnut St Ste 710
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Barbara Mann (E-Service)
Lea Alvo-Sadiky (E-Service)
Board Agent
National Labor Relations Board
Region 4
615 Chestnut St Ste 710
Philadelphia, PA 19106

Marielle Macher, Esq. (via FedEx)
Community Justice Project
c/o T. Jason Noye
118 Locust Street
Harrisburg, PA 17101

Joseph Gibley, Esq. (via FedEx)
Gibley and McWilliams, P.C.
524 N. Providence Road
Media, PA 19063-3056

KELLY SERVICES

DISPUTE RESOLUTION AND MUTUAL AGREEMENT TO BINDING ARBITRATION

Internal Dispute Resolution. I acknowledge that raising issues or concerns internally may address my concerns more efficiently. I further acknowledge that Kelly encourages all employees/candidates to approach immediate supervisors or managers with any issues or concerns they have and, if the matter is not resolved in a timely or satisfactory fashion by those supervisors or managers, to contact the Human Resources Representative who supports their location or the Kelly Business Conduct and Ethics Reporting Program at https://www.integrity-helpline.com/kellyservices.jsp or 1-877-978-0049.

In the event that these internal dispute resolution procedures do not resolve my issues or concerns informally, and in consideration of my employment/consideration for employment with Kelly and Kelly's mutual promise to arbitrate the categories of claims for relief that fall within the scope of this Agreement, I agree as follows:

1. Agreement to Arbitrate. Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration, instead of going to court, for any "Covered Claims" that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.

2. Claims Subject to Agreement. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.**

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (*e.g.*, NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

4. Arbitration Rules. Arbitration under this Agreement shall be on an individual basis before a single arbitrator in the county in which the dispute arose (unless the parties mutually agree otherwise). The employment dispute resolution rules of the American Arbitration Association ("AAA") effective at the time of filing will apply, a copy of which is available at all times on MyKelly.com or upon request from your Kelly Representative. This Agreement shall be governed by the Federal Arbitration Act[1]. The Arbitrator shall have the authority to award the same damages and other relief that would have been available in court pursuant to applicable law.

5. Choice of Law. Both Kelly Services and I agree that any disputes related to my employment relationship with Kelly Services shall be governed by the laws of the State of Michigan (the location of Kelly's world headquarters), regardless of conflicts of law principles.

6. Limitations on Actions. Kelly Services and I agree to bring any claims that each party may have against the other within 300 days of the day that such party knew, or should have known, of the facts giving rise to the cause of action, and The parties mutually waive any longer, but not shorter, statutory or other limitations periods. This waiver includes, but is not limited to, the initial filing of a charge with the Equal Employment Opportunity Commission and/or state equivalent civil rights agency. However, I understand that I will thereafter have the right to pursue any federal claim in the manner prescribed in any right to sue letter that is issued by an agency.

7. Confidentiality of Proceedings. All arbitration proceedings are confidential, unless applicable law provides otherwise. The arbitrator shall maintain the confidentiality of the arbitration to the extent the law permits, and the Arbitrator shall have the authority to make appropriate rulings to safeguard that confidentiality.

[1] For California employees/candidates, both the Federal Arbitration Act and the California Arbitration Act will govern.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

9. Arbitration Fees and Costs. I understand Kelly Services shall pay all costs uniquely attributable to arbitration, including the administrative fees and costs of the arbitrator. Each side shall pay its own costs and attorneys' fees, if any, unless the Arbitrator rules otherwise. If the applicable law affords the prevailing party attorney fees and costs, then the Arbitrator shall apply the same standards that a court would apply to award such fees and costs.

10. Arbitrator. The parties agree that the Arbitrator shall be either a retired judge or an attorney who is experienced in employment law and licensed to practice law in the state where the arbitration will be held. The AAA rules shall govern selection of the Arbitrator.

11. Motions and Discovery. Notwithstanding any AAA rules to the contrary, either party shall have the right to file Motions to Dismiss and Motions for Summary Adjudication / Judgment. The Federal Rules of Evidence shall apply to all arbitration proceedings under this Agreement. The Code of Civil Procedure for my state of residence shall apply to all discovery requests and proceedings under this Agreement.

12. Arbitrator's Award. Regardless of the Arbitrator selected, the Arbitrator's award shall be in writing, with factual findings, reasons given, and evidence cited to support the award. Judgment on the award may be entered in any court having jurisdiction over the matter.

13. No Retaliation. I understand that I may have a statutory right (*e.g.*, under the National Labor Relations Act) to act concertedly on behalf of myself and others to challenge this Agreement in any forum, and that if I act concertedly to pursue any such proceeding Kelly Services will not retaliate against me for doing so. I also understand that Kelly Services may seek to enforce this Agreement, including my agreement to arbitrate all claims and my agreement to forego pursuing any claim on a class, collective or representative basis, and may assert this Agreement as a defense in any proceeding.

14. At-Will Employment. I further understand that this Agreement is not a contract of continued employment, and that Kelly Services' policy is employment at will, which permits either me or Kelly Services to terminate the employment relationship at any time, with or without cause or advance notice.

15. Modification and Revocation. This Agreement can be revoked or modified only by a writing signed by me and an authorized representative of Kelly Services, referencing this Agreement and stating an intent to revoke or modify it. I understand that this Agreement shall survive the termination of my employment and that, should Kelly Services rehire me at any time subsequent to any termination of my employment, this Agreement shall remain in full effect for subsequent periods of employment.

16. Savings Clause & Conformity Clause. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

17. Headings. The headings in this Agreement are for convenience only. The headings form no part of this Agreement and shall not affect its interpretation.

18. Acknowledgement. I acknowledge that I have carefully read this Agreement, that I understand its terms, and that I have entered into the Agreement voluntarily and not in reliance on any promises or other representations by Kelly Services.

EMPLOYEE/CANDIDATE	**KELLY SERVICES, INC.**
T Noye:8166	Nina M. Ramsey
Signature	Signature of Authorized Representative
T J Noye	Nina Ramsey / SVP and Chief Human Resources Officer
Print Name	Print Name / Title
2/12/2015	02/12/2015
Date	Date

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KELLY SERVICES, INC.

and Case 04-CA-171036

T JASON NOYE, an Individual

ORDER ACCEPTING STIPULATION AND SETTING BRIEFING DATES

On March 30, 2017, the parties submitted a joint motion to submit this case to me on stipulation. The motion is GRANTED.

Briefs are due to be filed by May 15, 2017

It is so ORDERED.

Dated: Washington, D. C. March 31, 2017

Robert A. Giannasi
Administrative Law Judge

Davidson, Carletta

From: Alvo-Sadiky, Lea
To: Davidson, Carletta
Sent: Friday, March 31, 2017 9:42 AM
Subject: Read: KELLY SERVICES, INC. 4-CA-171036

Your message

To: Alvo-Sadiky, Lea
Subject: KELLY SERVICES, INC. 4-CA-171036
Sent: Friday, March 31, 2017 9:25:49 AM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, March 31, 2017 9:41:42 AM (UTC-05:00) Eastern Time (US & Canada).

Davidson, Carletta

From: Marielle Macher <mmacher@cjplaw.org>
To: Davidson, Carletta
Sent: Friday, March 31, 2017 9:26 AM
Subject: Read: KELLY SERVICES, INC. 4-CA-171036

Your message

To:
Subject: KELLY SERVICES, INC. 4-CA-171036
Sent: Friday, March 31, 2017 1:26:23 PM (UTC+00:00) Monrovia, Reykjavik

was read on Friday, March 31, 2017 1:26:18 PM (UTC+00:00) Monrovia, Reykjavik.

Davidson, Carletta

From: Sanchez, Karla E <KSanchez@seyfarth.com>
To: Davidson, Carletta
Sent: Friday, March 31, 2017 9:29 AM
Subject: Read: KELLY SERVICES, INC. 4-CA-171036

Your message

To:
Subject: KELLY SERVICES, INC. 4-CA-171036
Sent: Friday, March 31, 2017 1:29:20 PM (UTC+00:00) Monrovia, Reykjavik

was read on Friday, March 31, 2017 1:29:17 PM (UTC+00:00) Monrovia, Reykjavik.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.

and **Case 04-CA-171036**

T JASON NOYE, an Individual

BRIEF OF CHARGING PARTY T JASON NOYE IN SUPPORT OF FINDING OF UNFAIR LABOR PRACTICES

I. INTRODUCTION

Respondent Kelly Services, Inc. ("Respondent") concedes that, since at least September 2015, Respondent has maintained an arbitration agreement that purports to waive employees' right to bring or to participate in class or collective action litigation relating to their employment and that prohibits employees from seeking monetary damages through charges with the Board.[1] Respondent's arbitration agreement violates Section 8(a)(1) of the Act by (1) unlawfully interfering with Respondent's employees' rights to engage in protected concerted activity, and (2) interfering with and restricting employees' access to Board processes and remedies.

II. FACTUAL AND PROCEDURAL BACKGROUND

Charging Party T Jason Noye filed a charge with the National Labor Relations Board ("NLRB") on March 4, 2016 and an amended charge on July 14, 2016, alleging that Respondent violated and continues to violate Section 8(a)(1) of the National Labor Relations Act (the "Act") by maintaining an unlawful arbitration agreement. Stip. of Facts ("Stip.") at 2, 4. Specifically,

[1] It is Charging Party's position that the arbitration agreement does not apply to pre-employment disputes, and that for this and several other reasons, is not enforceable in the matter of *Noye v. Kelly Services, Inc.* et al. (1:15-cv-02382), pending before the U.S. District Court for the Middle District of Pennsylvania.

Charging Party alleges that Respondent maintains an arbitration agreement that (1) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to purport to waive their right to maintain class or collective actions in all forums with respect to their wages, hours, and other terms and conditions of employment; and (2) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings. *Id.* at 4.

On December 28, 2016, the Regional Director issued a Complaint and Notice of Hearing. *See* Compl.; Stip. at 2. On March 30, 2017, the NLRB's General Counsel, Charging Party, and Respondent agreed for this matter to be decided on a stipulated record. Stip. of Facts.

In the stipulation, Respondent concedes that since at least September 5, 2015, it has required all of its employees to enter into a Dispute Resolution and Mutual Agreement to Binding Arbitration (the "Arbitration Agreement"). Ex. 6 to Stip. The Arbitration Agreement states, in relevant part that

> [b]oth Kelly Services and I . . . agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.

Stip. at 3. In addition, the Arbitration Agreement states that

> I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), . . . but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

Stip. at 3.

As the stipulated facts make clear that Respondent has maintained an unlawful arbitration agreement, Charging Party now respectfully requests that the ALJ find that

Respondent has violated the Act.

III. ARGUMENT

First, Respondent's Arbitration Agreement violates Section 8(a)(1) of the Act by unlawfully interfering with Respondent's employees' rights to engage in protected concerted activity by requiring them to purport to waive their right to maintain class or collective actions relating to their employment. Second, the Arbitration Agreement interferes with and restricts employee access to Board processes. Accordingly, Charging Party respectfully requests that the ALJ grant all relief available under the Act, as set forth below.

A. Respondent's Arbitration Agreement Interferes with Respondent's Employees' Right to Engage in Protected Concerted Activity.

First, Respondent's Arbitration Agreement plainly interferes with Respondent's employees' right to engage in protected concerted activity by requiring them to purport to waive their right to maintain class or collective actions in all forums with respect to their wages, hours, and other terms and conditions of employment. As the Board has recognized, "[i]t is . . . well settled that the advancement of a collective grievance is protected activity" under the Act. *In Re D. R. Horton, Inc.*, 357 NLRB 2277, 2279 (2012). Filing or participating in a class or collective action is a way to advance such collective grievance and is thus protected activity. *Id.* Accordingly, "[m]andatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of the substantive right to act concertedly for mutual aid or protection that is central to the National Labor Relations Act." *Murphy Oil Usa, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) (citing *In Re D. R. Horton, Inc.*, 357 NLRB 2277).

Respondent concedes that its Arbitration Agreement purports to bar employees from participating in class or collective action litigation relating to their employment. Stip. at 3.

Thus, under clear Board precedent, Respondent's maintenance of its Arbitration Agreement violates Section 8(a)(1) of the Act.[2]

B. Respondent's Arbitration Agreement Interferes with and Restricts Board Processes.

Second, Respondent's Arbitration Agreement interferes with and restricts Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings. As the Board has previously held, "'[p]reserving and protecting access to the Board is a fundamental goal of the Act,' and so the Board must carefully examine employer rules that may interfere with this goal." *Ralphs Grocery Co. & Terri Brown*, 363 NLRB No. 128, at *1 (Feb. 23, 2016) (quoting *Solarcity Corp.*, 363 NLRB No. 83, at *6 (Dec. 22, 2015)). An employer policy interferes with or restricts Board processes when "employees would reasonably believe the policy interferes with their ability to file a Board charge or otherwise access the Board's processes." *Id.* at *1 (citations omitted). The right to file a charge and access Board processes includes the ability for the Board "to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures." *Id.* at *3. Any ambiguities in employer policies are construed against the employer as the drafter. *Supply Techs., LLC*, 359 NLRB 379, 381 (2012).

Here, Respondent's Arbitration Agreement explicitly restricts Board remedies by stating that employees cannot recover any monetary damages through Board processes and that employees must instead "pursue any claim for monetary relief through arbitration." Stip. at 3. By prohibiting employees from seeking monetary damages through Board processes,

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[2] Although the Supreme Court will soon be reviewing whether class action waivers violate the Act, current Board precedent is clear, and there is no stay on this case due to the fact that the Arbitration Agreement also interferes with access to Board processes. Accordingly, the Supreme Court's review does not restrict the ALJ from determining that Respondent has violated the Act.

Respondent's Arbitration Agreement strips the Board of its power to pursue appropriate relief under the Act—a critical part of the Board's function. This blatant restriction and interference with Board processes constitutes a second violation of Section 8(a)(1) of the Act.

C. Relief Sought

As there is no real question that Respondent has violated and continues to violate Section 8(a)(1) of the Act, Charging Party respectfully requests all relief available under the Act. This includes ordering that Respondent:

- Cease and desist from maintaining or enforcing a mandatory arbitration agreement that purports to waive bringing or participating in class or collective actions;
- Cease and desist from maintaining or enforcing a mandatory arbitration agreement that interferes with or restricts Board processes;
- Cease and desist in any like or related manner from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act;
- Rescind the Arbitration Agreement;
- Notify all current and former employees who were required to sign the Arbitration Agreement that it has been rescinded;
- Provide a sworn certification to the Regional Director of all steps taken; and
- Reimburse Charging Party for his reasonable attorneys' fees and costs.

See, e.g., *Cowabunga, Inc. & Chadwick Hines*, 363 NLRB No. 133, at *6-7 (Feb. 26, 2016); *Lincoln E. Mgmt. Corp. & Alecia Winters*, 364 NLRB No. 16, at *5-6 (May 31, 2016).

IV. CONCLUSION

Respondent has violated and continues to violate Section 8(a)(1) of the Act by maintaining an arbitration agreement that purports to waive class and collective action remedies as to claims relating to employees' employment and that interferes with and restricts Board processes. Accordingly, the ALJ should award all relief available under the Act.

Date: May 15, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2017, I served the Brief of Charging Party T Jason Noye in Support of Finding of Unfair Labor Practices on the following persons:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.

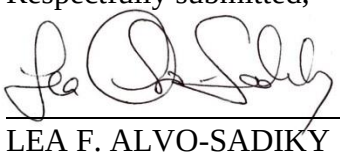
and **Case 04-CA-171036**

T JASON NOYE, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

To: Honorable Robert A. Giannasi
Chief Administrative Law Judge

Respectfully submitted,



Dated: May 15, 2017

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Cases

I. INTRODUCTION

Respondent Kelly Services, Inc. (Respondent) has maintained on a corporate-wide basis, as a condition of employment for all employees, a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (Arbitration Agreement) that explicitly prohibits employees from filing collective claims in either a judicial or arbitral forum and interferes with its employees' access to the National Labor Relations Board by prohibiting employees from recovering any monetary relief from the filing of any such charges. (SOF ¶2; JX-6)[1]

Respondent's Arbitration Agreement fall squarely within the ambit of the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014),), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017) and *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.2d 344 (5th Cir. 2013), which prohibit employers from imposing policies or agreements that preclude employees from pursuing employment related collective claims as a condition of employment and from restricting employees' access to Board processes. Respondent's Arbitration Agreement also falls squarely within the ambit of the Board's decision in *U-Haul Co. of California*, 347 NLRB 375, 377-378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), which made clear that mandatory arbitration policies that interfere with employees' right to file an unfair labor practice charge or otherwise restrict employee access to the Board's processes are unlawful. By requiring, as a condition of employment, employees to resolve any disputes arising out of their employment relationships with Respondent on an individual basis, and by interfering with employee access to the Board Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

[1] Throughout this Brief, SOF refers to the Stipulation of Facts, followed by the ¶ number; JX refers to the Joint Exhibits followed by the exhibit number.

II. PROCEDURAL HISTORY

On March 4, 2016, Charging Party T Jason Noye, filed a charge in Case 04-CA-171036 alleging that Respondent violated Section 8(a)(1) by maintaining an unlawful mandatory arbitration agreement. (JX-1) On July 14, 2016, the Charging Party amended the charge to add an allegation that Respondent's maintenance of unlawful arbitration agreements also restricts the remedies available in charges filed with the National Labor Relations Board. (JX-2) On December 28, 2016, the Regional Director of Region 4 issued a Complaint and Notice of Hearing alleging that Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful arbitration agreement. (JX-3) On January 11 and 12, 2017 respectively, Respondent filed its Answer to the Complaint and Amended Answer to the Complaint. (JX-4; JX-5) Because the facts in this case are not in dispute, the parties filed a Joint Motion and Stipulation of Facts. In the Joint Motion, the Parties agreed that the record in this case shall consist of the joint stipulation of facts, including all exhibits attached thereto. On March 31, 2017, Chief Administrative Law Judge Robert A. Giannasi issued an Order Accepting Stipulation and Setting Briefing Dates.

III. STATEMENT OF THE ISSUES

1. Whether Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment?
2. Whether Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with and restricts employee access to Board processes by

prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings?

IV. STATEMENT OF THE FACTS

Respondent is a corporate entity with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, engaged in providing temporary staffing to employers. (SOF ¶1). Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained the Arbitration Agreement as a condition of employment for all employees. (SOF ¶4; JX-6). The Arbitration Agreement includes, inter alia, the following provisions:

> **1. Agreement to Arbitrate.** Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration, instead of going to court, for any "Covered Claims" that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.
>
> **2. Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)
>
> **3. Exclusions from Agreement.** The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute

to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

16. **Savings Clause & Conformity Clause**. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

V. ARGUMENT

A. Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment.

In *D.R. Horton, Inc.*, supra, the Board held that arbitration agreements imposed on employees as a condition of employment that preclude employees from pursuing employment-related collective claims in any forum, arbitral or judicial, unlawfully restricts employees' Section 7 right to engage in protected concerted activity. 357 NLRB at 2280 The Board further

made clear that the proper test for determining whether class action waivers contained in arbitration agreements constitute a rule that violates Section 8(a)(1) of the Act is that set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). *D.R. Horton*, 357 NLRB at 2280. Under that test, a policy such as Respondent's violates Section 8(a)(1) if it expressly restricts Section 7 activity or, alternatively, when (1) employees would reasonably read it as restricting such activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia,* supra at 646-647.[2]

In *Murphy Oil USA, Inc.*, supra, the Board independently re-examined *D.R. Horton*, considered adverse judicial decisions, and reaffirmed that decision. Since then, the Board has repeatedly and consistently held that agreements that require employees, as a condition of employment, to refrain from bringing collective action in any forum, either judicial and arbitral, unlawfully restrict employees' Section 7 rights. See *Bristol Farms*, 364 NLRB No. 34 (2016) (holding that mandatory arbitration agreement which as applied precluded collective action in all forums was unlawful); *Adecco USA, Inc.*, 364 NLRB No. 9 (2016) (holding that a class waiver arbitration agreement that also barred the charging party from filing a private attorney general act cause of action was unlawful); *ISS Facilities Services, Inc.*, 363 NLRB No. 160, slip op. at 2 (2016) (maintenance of class waiver arbitration agreement unlawful); *Kenai Drilling Limited*, 363 NLRB No. 158 (2016) (maintenance and enforcement of class waiver arbitration agreement unlawful); *RPM Pizza, LLC*, 363 NLRB No. 82 (2015) (same).

As set forth above in the statement of facts, Respondent requires its employees to sign the Arbitration Agreement as a condition of employment that limits the resolution of all "Covered

[2] An employer may violate Section 8(a)(1) through the mere maintenance of certain work rules, "even absent evidence of enforcement." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd. mem.*, 203 F.3d 52 (D.C. Cir. 1999).

Claims,"—essentially any employment-related disputes—to arbitration and expressly restricts employees from participating in "any class, collective, or representative proceeding." (JX-6) In this regard, this case is indistinguishable from *D.R. Horton*. Even if this language was not considered an explicit prohibition on Section 7 activities, employees would reasonably construe it in that manner given the broad prohibitive language of the Arbitration Agreement. *Murphy Oil*, 361 NLRB No. 72, slip op. at 26 (holding that although Respondent's "Revised Agreement does not expressly prohibit the exercise of Section 7 rights, it still violates Section 8(a)(1) because employees subject to the Revised Agreement would reasonably construe it as waiving their right to pursue employment-related claims concertedly in all forums" citing *Lutheran Heritage Village,* 343 NLRB at 647). By requiring employees to sign the Arbitration Agreement as a condition of employment, Respondent has attempted to foreclose all concerted employment-related litigation or arbitration by employees and effectively stripped employees of their Section 7 right to engage in this form of concerted activity for their mutual aid and protection.[3]

Respondent may contend that the Arbitration Agreement at issue in this case is lawful and does not bar all concerted employee activity in pursuit of employment claims because it explicitly permits employees to file charges with the Board. The Board has repeatedly rejected such arguments. See *Lincoln Eastern Management Corp*., 364 NLRB No. 16, slip op. at 3, fn. 2 (2016); *Ralph's Grocery Co*., 363 NLRB No. 128, slip op. at 3 (2016). As the Board stated in *SolarCity Corporation*, 363 NLRB No. 83 slip op. at 1 (2015), despite an explicit exception of claims brought before the Board, "access to administrative agencies is not the equivalent of access to a judicial forum where employees themselves may seek to litigate their claims on a joint, class, or collective basis." Therefore, this defense is wholly without merit.

[3] Even if Respondent's Arbitration Agreement was not a condition of employment, it would still be unlawful. *Bristol Farms*, supra, 364 NLRB No. 34, slip op at 1, fn. 3; *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

Based on the above, Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment.

B. Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

The Board has "long recognized that 'filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7.'" *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 4 (2016) quoting *Mesker Door, Inc.*, 357 NLRB 591, 596 (2011). Recognizing that preserving access to the Board is "a fundamental goal of the Act," the Board must "carefully examine employer rules that interfere with this goal." *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2 citing *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4). In *U-Haul Company of California*, supra, the Board, applying the *Lutheran Heritage* test described above, made clear that mandatory arbitration policies that are required as a condition of employment are also unlawful if the policy expressly restricts or employees would reasonably believe the policy interferes with their ability to file a Board charge or access to the Board's processes. 347 NLRB at 377-78. See also, e.g., *Dish Network, LLC*, 365 NLRB No. 47, slip op. at 2 (2017).

Even where agreements contain a "savings clause" with explicit exclusions of claims under the Act, the Board has held that the "savings clause" language must be read in context of the complete agreement or policy to determine, under the *Lutheran Heritage* test, whether employees would reasonably believe that the policy interferes with their ability to file a Board

charge. See, e.g., *SolarCity Corp.*, 363 NLRB No. 83 slip op. at. 5; *Hooters of Ontario Mills*, 363 NLRB No. 2, slip op. at 1-2 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 1-3 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 fn. 4 (2015). Further, the Board "recognize[s] that 'rank-and-file employees … cannot be expected to have the same expertise [as lawyers] to examine company rules from a legal standpoint.'" *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2 quoting *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 1.

Indeed, the Board has routinely held arbitration agreements unlawful after applying the *Lutheran Heritage* test and finding that in context of the complete agreement employees would reasonably believe that the policy interferes with their ability to file a Board charge. See e.g. *Lincoln Eastern Management*, supra, slip op. at 2-3 (mandatory arbitration policy unlawful finding because it was "not written in a manner reasonably calculated to assure employees that their statutory right of access to the Board's processes remains unaffected"); *Bloomingdale's, Inc.*, 363 NLRB No. 172 slip op. at 5-6 (2016) (holding arbitration agreement expressing that "claims…under the National Labor Relations Act are…not subject to arbitration" also unlawful because in the context of the whole agreement it would not reasonably be clear to employees that they may file charges with the Board)*; Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 2-3 (same). See also *Bill's Electric, Inc*., 350 NLRB 292, 296 (2007) (mandatory grievance and arbitration policy, which also included a "provision for imposition of litigation costs if an employee persisted in seeking initial Board relief," unlawful notwithstanding an express reference to Board charges, as the policy would reasonably be read "as substantially restricting, if not totally prohibiting," access to the Board's processes).

In *Professional Janitorial Service of Houston*, 363 NLRB No. 35, slip op. at 1-2 (2015), the Board found a violation even though the contested policy contained an "Exclusions and Restrictions" section that included "any non-waivable statutory claims, which may include … charges before the … National Labor Relations Board, or similar local or state agencies …." The policy in *Professional Janitorial Service* went on to state that "if such an agency completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights …." *Id.*, slip op. at 2. The Board concluded that the exclusions language described "only a limited exclusion of indeterminate scope." *Id.* Moreover, the Board found that the suggestion, that even if employees filed charges with the Board they might ultimately be required to arbitrate their claim, would reasonably be read as indicating that an unfair labor practice charge could only be resolved through arbitration. *Id.*, slip op. at 3.

Here, Respondent, required employees to sign the Arbitration Agreement as a condition of employment; mandating "binding arbitration, instead of going to court, for any 'Covered Claims' that arise between employees and Respondent." (SOF ¶4; JX-6, ¶ 1) Like the language in the *U-Haul* agreement, the Covered Claims in the Arbitration Agreement encompasses "all common-law and statutory claims relating to … employment," including claims for unpaid wages, wrongful termination, discrimination, harassment, and retaliation normally reserved for the Board. This very broad language is then followed by the statement, in bold, "that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims." (JX-6, ¶ 2) This language would reasonably lead employees to believe that any claim related to their termination, wages, compensation, work hours or any other employment dispute covered under the Act, a federal statute, must be submitted to Respondent's arbitration procedures.

The Arbitration Agreement, using broad language that virtually all claims arising out of the employment relationship are subject to mandatory arbitration, is not saved by Respondent's language permitting the filing of Board charges. The Arbitration Agreement is ambiguous when read as a whole because the first two paragraphs broadly required arbitration of all claims arising from the employment relationship; and the third paragraph, the "Exclusions from Agreement" clause, while excluding certain types of claims such as unemployment and workers compensation claims does not explicitly mention unfair labor practice claims. Further, it is only at the end of this Exclusion clause that there is any mention of allowing for the filing of administrative charges, followed by a requirement that arbitration is required to recover any monetary relief, suggesting that it is futile to file a charge with the Board because all disputes would ultimately be resolved through arbitration. (JX-6, ¶ 3) Moreover, the Exclusion clause is followed later in the agreement with the clause waiving class and collective claims. (JX-6, ¶ 8) In the actual "Savings Clause," almost at the end of the document, if the waiver of collective claims is found unenforceable, employees are required to bring any collective action "in a court of competent jurisdiction." (JX-6, ¶ 16) Such language is insufficient to cure an otherwise unlawful policy because an employee especially one without "specialized legal knowledge" would be unable to determine from this language, whether and to what extent the Arbitration Agreement's exception for filing charges with Federal agencies modifies the broad prohibition on pursuing any form of collective or representative activity, particularly since the "savings clause" does not clarify that such charges may be filed on an individual or collective basis. This ambiguity would lead a reasonable employee to question whether (b)(6) may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees. *See SolarCity Corporation*, 363 NLRB No. 83, slip op. at 6-8; *ISS Facilities Services, Inc.*, 363 NLRB No.

160, slip op at 3. Such a clause at best creates an ambiguity which must be construed against Respondent as the Arbitration Agreement's drafter. *Lafayette Park Hotel*, 326 NLRB at 828.

Additionally, although the Arbitration Agreement's exclusion clause, was apparently intended to save Respondent from any claim that its Arbitration Agreement policy violates employees' Section 7 rights, it is a Trojan Horse, for within the policy is a waiver of employees' rights to any "monetary recovery" for administrative claims filed with state or federal government or with administrative agencies, regardless of who filed those claims, other than through arbitration. The provision ensures that even if someone other than an employee, such as another employee, a labor organization, or any other individual or organization, pursues a Board charge or some form of collective action through an administrative agency, the remedy for the Board charge or other claim would be gutted, as an employee subject to the Arbitration Agreement policy would not be entitled to any monetary remedy for that action. Thus, just as in *Professional Janitorial Service of Houston*, "[e]mployees, particularly those unfamiliar with the Board's procedures, would reasonably read this language to state that even if access to the Board is permitted initially, their unfair labor charge can be resolved only through arbitration under the Respondent's policy." 363 NLRB 35 slip op at 3. See also *Bill's Electric*, 350 NLRB at 296 (Board finding arbitration and grievance agreement would reasonably be read by employees "as substantially restricting, if not totally prohibiting, their access to the Board's processes.")

Accordingly, as a whole, the Arbitration Agreement would reasonably be read by employees to restrict their statutory right of access to the Board. By maintaining the Arbitration Agreement, Respondent has interfered with employees' Section 7 right to file charges with the Board and avail themselves of the Board's processes in violation of Section 8(a)(1) of the Act.

C. Respondent's affirmative defenses are without merit

Respondent raises several affirmative defenses in its Amended Answer to the Complaint. (JX-5) As discussed below, the Administrative Law Judge should dismiss Respondent's affirmative defenses because they are without merit.

Respondent first asserts that the "Complaint fails to state a claim for which relief may be granted." (JX-5 at 5) Under Section 102.15 of the Board's Rules and Regulations, a well-pleaded complaint requires only "(a) [a] clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) [a] clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." Here, the Complaint comports with these requirements. The Complaint clearly states the dates the alleged violations occurred, describes Respondent's conduct alleged to be unlawful and identifies the section of the Act Respondent violated. See e.g. *American Newspaper Publishers Assn. v. NLRB,* 193 F.2d 782, 800 (7th Cir. 1951), *affd.* 345 U.S. 100 (1953) ("All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the respondent may be put upon his defense." quoting *NLRB v. Piqua Munising Wood Products Co.,* 109 F.2d 552, 557 (6th Cir. 1940)). Accordingly, Respondent's first affirmative defense should be dismissed.

Respondent's second through fifth affirmative defenses contend that the Arbitration Agreement is enforceable under the Federal Arbitration Act (FAA); *D.R. Horton* and *Murphy Oil* conflict with the FAA, the Act creates no substantive right to employees to insist on class-type treatment of non-NLRA claims; and the Board's requested remedies are precluded by the FAA

and federal policy favoring arbitration of disputes. These contentions have been previously considered and rejected by the Board.

The Board emphasized in *D.R. Horton* that finding an arbitration agreement unlawful does not conflict with the FAA because "the intent of the FAA was to leave substantive rights undisturbed." 357 NLRB at 2286. Respondent's Arbitration Agreement expressly requires that employees prospectively sign away their substantive Section 7 right to join together and pursue collective relief from the Employer's violations of other laws in any forum, and therefore cannot be enforceable under the FAA.

In *Murphy Oil, the* Board emphatically affirmed that the FAA's savings clause provides for the revocation of otherwise mandatory arbitration agreements "upon such grounds as exist at law…" and that "Section 7… amounts to a 'contrary congressional command' overriding the FAA." 361 NLRB No. 72, slip op. at 9. As the Board noted in *D.R. Horton*, the Supreme Court has not heretofore addressed whether an employer can infringe upon employees' substantive Section 7 right to concertedly pursue employment-related claims. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), for example, arose in the context of a commercial arbitration agreement and the high court focused its opinion on the preemption of a state consumer protection law, not employees' substantive, federal collective action rights under Section 7 of the Act. 357 NLRB at 2287.

Moreover, in *Murphy Oil*, the Board explained that when the NLRA was enacted in 1935 and amended in 1947, the FAA had not ever been applied to individual employment contracts, and noted:

> [i]t is hardly self-evident that the FAA – to the extent that it would compel Federal courts to enforce mandatory individual arbitration agreements prohibiting concerted legal activity by employees – survived the enactment of the Norris- LaGuardia Act [in 1932] and its sweeping prohibition of "yellow dog" contracts.

361 NLRB No. 72, slip op. at 10. The Board found that, even if there is a conflict between the NLRA and the FAA, the Norris-LaGuardia Act prevents enforcement of any private agreement inconsistent with the statutory policy of protecting employees' concerted activity, including an agreement that seeks to prohibit a "lawful means [of] aiding any person participating or interested in a lawsuit arising out of a labor dispute." *Id.* The Board found that in the event of a conflict, the FAA would therefore have to yield to the Act insofar as necessary to accommodate employees' substantive Section 7 rights. *Id.*

Despite some courts' rejections of the Board's position, the Board's holdings in *D.R. Horton, Murphy Oil* and their progeny remain Board law unless and until that position is reversed by the Supreme Court.[4] See, e.g., *Pathmark Stores*, 342 NLRB 378, n.1 (2004). In *Pathmark Stores*, the Board reiterated that:

> [i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise … [I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

342 NLRB 378, n. 1 (2004) (emphasis added), quoting *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964), quoting *Insurance Agents' International*

[4] Although the Supreme Court has granted certiorari in, and consolidated cases, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), cert. granted; *Lewis v. Epic Systems Corp*., 823 F.3d 1147 (7th Cir. 2016), cert. granted; and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), cert. granted, to determine the issues presented in *D.R. Horton* and *Murphy Oil*, the Court will not hear the case until the October 2017 term.

Union, AFL-CIO, 119 NLRB 768, 773 (1957). See also, discussion of the Board's non-acquiescence policy in *Citigroup Technology, Inc.*, 363 NLRB No. 55, slip op. at 6-7 (2015). Accordingly, these affirmative defenses are without merit.

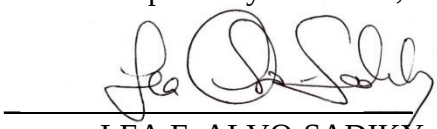
VI. CONLUSION AND REMEDY

Based on the foregoing, Counsel for the General Counsel submits that Respondent violated Section 8(a)(1) of the Act as alleged in the Complaint. Counsel for the General Counsel respectfully requests the Administrative Law Judge to so find and order a full, comprehensive and appropriate remedy.

As a remedy for Respondent's unfair labor practices, The General Counsel seeks an Order requiring Respondent to: (1) cease and desist from maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts the right to: file or maintain class and/or collective actions; file charges with the Board; and receive monetary remedies as a result of unfair labor practice charges; (2) rescind the provisions of the Arbitration Agreement requiring employees to forego any rights they would otherwise have to resolve work-related disputes through collective or class action and notify all employees subject thereto of the rescission; (3) rescind the provisions of the Arbitration Agreement restricting employees' rights to file charges with the Board and receive monetary remedies as a result of unfair labor practice charges and notify all employees subject thereto of the rescission; (4) post at all locations where the Arbitration Agreement has been in effect a Notice to Employees; and (5) electronically transmit the Notice to Employees to all employees employed by Respondent.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor. A copy of a proposed Notice is attached.

Respectfully submitted,



Dated: May 15, 2017

LEA F. ALVO-SADIKY
Counsel for the General Counsel
National Labor Relations Board
Fourth Region
615 Chestnut Street, Suite 710
Philadelphia, Pennsylvania 19106

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain a mandatory arbitration agreement that waives your right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory arbitration agreement that you reasonably could believe restricts your right to file charges with the National Labor Relations Board or obtain remedial relief in charges filed with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the "Dispute Resolution and Mutual Agreement to Binding Arbitration" in all its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL rescind or revise the "Dispute Resolution and Mutual Agreement to Binding Arbitration" in all its forms to make clear that the arbitration agreement does not restrict your right to file charges and to receive a statutory remedy with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the "Dispute Resolution and Mutual Agreement to Binding Arbitration" in all of its forms that this portion of the arbitration agreement has been rescinded or revised and, if revised, **WE WILL** provide them a copy of the revised agreement.

KELLY SERVICES, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Telephone: (215)597-7601
Hours of Operation: 8:30 a m. to 5 p m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.,

and **Case 04-CA-171036**

T JASON NOYE, an Individual

RESPONDENT KELLY SERVICES, INC.'S BRIEF

Gerald L. Maatman, Jr., Esq.
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(312) 460-5000

Counsel for Respondent

May 15, 2017

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RESPONDENT'S BRIEF

Respondent Kelly Services, Inc. ("Respondent" or "Kelly") submits this brief in accordance with the Administrative Law Judge's ("ALJ") March 31, 2017 Order to the Stipulation of Facts, Joint Motion to Submit Case on Stipulation and Joint Motion Requesting Permission to Forgo Submission of Short Position Statements ("Stipulation").

INTRODUCTION

This case concerns Kelly's Dispute Resolution and Mutual Agreement to Binding Arbitration ("Agreement"). The Agreement provides that employees who sign it will arbitrate their employment-related claims on an individual basis, thereby waiving participation in collective or class actions. (J-Ex. 6).[1] Kelly contends that such Agreement is lawful. Of course, the legality of agreements that contain waivers of participation in collective or class actions have been the subject of significant litigation with the National Labor Relations Board ("NLRB" or "Board") and various U.S. Courts of Appeals. The legality of these types of agreements is currently an issue pending U.S. Supreme Court review in three consolidated cases: *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert granted*, S. Ct. No. 16-307 (Jan. 13, 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert granted*, S. Ct. No. 16-285 (Jan. 13, 2017); and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), *cert granted*, S. Ct. No. 16-300 (Jan. 13, 2017).

Given that the Supreme Court is currently reviewing the legality of such agreements, the Supreme Court and not the Board, will determine the legality of arbitration agreements that contain waivers of class/collective litigation under the National Labor Relations Act ("NLRA" or

[1] Throughout this brief, references are made to the joint exhibits set forth in the Stipulation as "J-Ex. ___."

"Act"). Moreover, the NLRB's own position on this issue is subject to change given the change in the presidential administration. Accordingly, while analysis is presented below addressing this allegation and Kelly believes the Supreme Court will find the NLRB's position to be erroneous and in conflict with the Federal Arbitration Act ("FAA"), this issue cannot and will not be resolved until the Supreme Court issues its decision in the consolidated cases.[2]

The Agreement also contains a section that explicitly states that employees can file administrative charges, including charges with the NLRB. (J-Ex. 6). The Agreement explains, however, that while employees can file charges with the NLRB, to obtain any monetary remedy, the claims must be pursued through arbitration. The Counsel for the General Counsel ("GC") contends that this section of the Agreement is unlawful because it "interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings." (Stipulation at p. 3). Backpay is not a Board process -- it is a remedy. Moreover, there is no authority setting forth that parties cannot agree to settle their statutory disputes outside of the Board's processes. As set forth more fully below, Supreme Court authority not only supports the resolution of statutory claims via arbitration, but the NLRA's statutory language, the NLRB's Casehandling Manual, and the Board's processes and procedures all show that the GC's position has no merit and that the Complaint must be dismissed.

FACTS

I. The Stipulated Facts

1. "Respondent has been a corporation with facilities located throughout the United

[2] Kelly requested that this allegation be stayed pending the Supreme Court's decision. The Region declined to grant a stay.

States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers. In conducting its operations during the past 12-month period, Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act." (Stipulation at pp.1-2).

2. "Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees [the Agreement] (attached as J-Ex. 6), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)
>
> **3. Exclusions from Agreement.** The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

> **8. Waiver of Class and Collective Claims.** Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding."

(Stipulation at pp. 2-3).

II. The Stipulated Issues

The issues are the following: "whether Respondent's maintenance of the Arbitration Agreement described above in Paragraph 4 violates Section 8(a)(1) of the Act because it: (i) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment; and (ii) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings." (Stipulation at p. 3).

ARGUMENT

I. The General Counsel Bears the Burden of Proof

The GC bears the burden of proof on each allegation in the Complaint. *See Nations Rent, Inc.*, 342 NLRB 179, 180 (2004) ("The General Counsel has the burden of proving every element of a claimed violation of the Act."); *accord Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 n.5 (2003); *Western Tug & Barge Corp.*, 207 NLRB 163, 163 n.1 (1973). As discussed in more detail below, there are no merits to the allegations, the GC cannot meet her burden, and Respondent respectfully requests that the complaint be dismissed in its entirety.

II. The Agreement's Class Action Waiver Does Not Violate the Act

Contrary to the NLRB's position, the FAA and not the NLRA controls as to whether or not the arbitration agreement is lawful. The NLRB's insistence on regulating outside of its statutory jurisdiction requires the Supreme Court to admonish it as it has done when the NLRB had tried to step outside of its bounds. *See, e.g.*, *Southern S.S. Co. v. NLRB,* 316 U.S. 31, 47 (1942) ("Particularly relevant to this dispute is that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."); *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 144 (2002) ("Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." "[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.").

A. The FAA Requires That An Arbitration Agreement Be Enforced According To Its Terms

The FAA is "[t]he background law governing questions relating to the enforcement of an arbitration provision, even when other federal statutes are at issue." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012) (internal quotation marks omitted). It "establishes 'a liberal federal policy favoring arbitration agreements.'" *Id.* at 669 (internal citation omitted). Moreover, the type of arbitration "envisioned by the FAA" is "bilateral" (individual) arbitration, not class arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348, 351 (2011).

Under the FAA, the default rule is enforceability. The FAA plainly states that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as

exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987); *see also Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (explaining that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

Because as a matter of federal substantive law, the FAA establishes a presumption in favor of enforcing arbitration agreements as written, the Supreme Court for decades has consistently upheld the FAA's policy favoring enforcement of arbitration agreements. *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *American Express Co. v. Italian Colors Restaurant*, 559 U.S. 1103 (2010); *CompuCredit*, 565 U.S. 95; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *McMahon*, 482 U.S. 220; *Mitsubishi Motors Corp. v. Soler Chryslster-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

This presumption may be overcome only under two exceptions: (1) an arbitration agreement may be invalidated on a ground that would invalidate a contract under the FAA's "saving Clause," *Concepcion*, 563 U.S. at 339-340; or (2) if another federal statute qualifies as a "congressional command" that is "contrary" to the FAA's enforcement mandate. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). This contrary congressional command cannot be "obtuse," but rather must indicate Congress's contrary intent with some "clarity." *Id.* at 672. Neither one of these exceptions applies here.

1. The FAA's Saving Clause Does Not Provide Support For The GC's Position

The FAA's "saving clause" reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA's savings clause allows courts to decline to enforce arbitration agreements based on generally applicable contract defenses; that is, those that provide "for the revocation of any contract." 9 U.S.C. § 2. This is not at issue here.

The Supreme Court's precedent in *Concepcion* makes clear that the "saving clause" does not apply to the NLRB's position that an agreement waiving class or collective action makes the saving clause applicable. *D.R. Horton v. NLRB*, 737 F. 3d 344, 359 (5th Cir. 2013) (analyzing *Concepcion*). *Concepcion* concerned a California statute that prohibited class action waivers in arbitration agreements. 563 U.S. 351-352. The Supreme Court considered whether the fact that the statute prohibited class-action waivers in both judicial and arbitral proceedings meant that the prohibition was covered under the FAA's saving clause. *Id.* at 1748. The Court held that the saving clause was inapplicable and the California statute was preempted by the FAA because: "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," and "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* Like in *Concepcion*, the NLRB's position with respect to arbitration agreements that waive class/collective litigation is to "disfavor arbitration." *D.R. Horton*, 737 F. 3d at 359. "Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The saving clause is not a basis for invalidating the waiver of

class procedures in the arbitration agreement." *Id.* at 360. Accordingly, just like in *Concepcion*, here, the NLRB's position must give way to the FAA's purpose of encouraging and enforcing arbitration agreements.

2. The NLRA Is Not A "Contrary Congressional Command"

Under the standards set forth by the Supreme Court, the NLRA is not a "contrary congressional command" that bars class waivers in arbitration agreements. *CompuCredit*, 565 at 97-98; *see Morris v. Ernst & Young, LLP*, 834 F.3d 975, 987 (9th Cir. 2016) (Ikuta, J., dissenting). To find that such a command exists, the command "will be discoverable in the text," the statute's "legislative history," or by the finding of "an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26.

The NLRA's text does not support the Board's position. Section 7 of the NLRA does not expressly prohibit class waivers: it grants employees the right "to engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To qualify as a contrary congressional command, therefore, Section 7 would have to actually give employees the right to arbitrate or litigate a dispute as a class or collective action. But that interpretation is not compelled by the statutory language. In fact, the statutory language supports an opposite finding. Section 9(a) of the Act gives employees the right as "individual[s]" to "present" and "adjust" grievances "at any time." 29 U.S.C. § 159(a). Similarly, Section 10(a) of the Act states that the Board's power is limited by "other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a). As Chairman Miscimarra summarized:

> However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial

> dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time." This aspect of Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time. This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7.

AWG Ambassador, LLC, 363 NLRB No. 137, slip op. at 2 (Feb. 25, 2016) (Miscimarra, P., dissenting); *see also Prime Healthcare Paradise Valley, LLC*, 363 NLRB No. 169, slip op. at 3 (Apr. 22, 2016) (Miscimarra, P., dissenting). Accordingly, it follows that "[n]o court decision prior to the Board's ruling [in *D.R. Horton*] had held that the Section 7 right to engage in 'concerted activities for the purpose of ... other mutual aid or protection' prohibited class action waivers in arbitration agreements.'" *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013).

The legislative history also does not support the Board's position. As the Fifth Circuit found, there is no legislative history of a "disavowal of arbitration." *D.R. Horton*, 737 F. 3d at 361. "[T]he legislative history of the NLRA, and its predecessor, the National industrial Recovery Act of 1933, only supports a congressional intent to 'level the playing field' between works and employers by empowering unions to engage in collective bargaining." *Id.* Furthermore, as Chairman Miscimarra noted, it is clear that Congress did not intend to use the NLRA to preclude waivers of class and collective actions because class actions did not exist at the time of the NLRA's adoption. *Murphy Oil*, 361 NLRB No. 72, slip op. at 28 (2014) (Miscimarra, P., dissenting) (noting that "modern class action practice" did not exist until about three decades after the NLRA's adoption).

Similarly, there is no basis for finding an inherent conflict between the FAA and the NLRA. As the Fifth Circuit explained:

> We know that the right to proceed collectively cannot protect vindication of employees' statutory rights under the ADEA or FLSA because a substantive right

> to proceed collectively has been foreclosed by prior decisions. . . The right to collective action also cannot be successfully defended on the policy ground that it provides employees with greater bargaining power. 'Mere inequality in bargaining power . . . is not sufficient reason to hold that arbitration agreements are never enforceable in the employment context.' . . . The end result is that the Board's decision creates either a right that is hollow or one premised on an already-rejected justification.

Id. at 361 (internal citations omitted).

Moreover, the Board's position makes no sense. If the NLRA were indeed the source of employees' putative right to proceed as a class or collective action in litigation or arbitration, employees could commence such proceedings directly under the NLRA. *See Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 311 (D. Mass. 2016). They presumably could have done so even before the federal rules were revised to provide for class litigation of legal claims. *See generally Italian Colors*, 133 S. Ct. at 2309-10 (describing the advent of Federal Rule of Civil Procedure 23). Yet, employees have never sought class or collective remedies under the NLRA, because no such right exists.

Moreover, if Section 7 of the Act gives employees the right to proceed in a class or collective action, Section 8 makes it an unfair labor practice for an employer "to interfere with" that "right[ ]." 29 U.S.C. § 158(a)(10). The logical consequence of this is that any employer opposition to employees' efforts to certify a class or collective action or arbitration "interfe[s] with" the employees' "right[ ]." *See id.; Bekele*, 199 F. Supp. 3d at 312 ("If the ability to pursue a class action is a substantive right protected by Section 7, could an employer oppose class certification without "interf[ing] with" that right? Would the filing of an opposition to class certification automatically amount to a violation of Section 8?"). That would make certification of class or collective actions automatic when they are brought by employees against their employer. *See Bekele*, 199 F. Supp. 3d at 311-312 (making a similar observation). Nothing in the NLRA suggest that was Congress's intended result, however. Accordingly, the NLRA does

not give employees a right to proceed in class arbitration, and certainly not a right that trumps the FAA's presumption that arbitration agreements are enforceable as written. Therefore, the ALJ must find, as Circuit Courts have already found, that the Board's position cannot be sustained. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert granted*, U.S. S. Ct. No. 16-307 (Jan. 13, 2017); *D. R. Horton v. NLRB*, 737 F. 3d 344 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013).

III. The Agreement Does Not Interfere with The Board's Processes

According to the GC, the Agreement "interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings." (J-Ex. 3). There is no merit to this allegation. The Agreement specifically provides:

> I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

(J-Ex. 6). Thus, while the Agreement explains that employees are able to file charges with governmental agencies, which may process the charges, the employees must pursue their claims through arbitration to obtain any monetary relief.

As an initial matter, the GC's position is illogical. The GC is seeking to draw an arbitrary distinction between cases in which backpay could be or is awarded and cases in which no backpay could be or is not awarded. There is no statutory support or case law precedent for this arbitrary distinction. What the GC's arbitrary position highlights, however, is the fact that there is no merit to this allegation. If the GC's position was accepted, the same agreement would

be found lawful where no backpay could be or was awarded, whereas the agreement would be found unlawful if the employee was able to obtain monetary remedies. This would be the result even though the employees signed the same Agreement and proceeded through the Board's processes. In fact, in this case, the remedy sought by the Board is "an Order requiring that Respondent rescind the provisions of its Arbitration Agreement set forth in paragraph 3(a) and notify all employees employed by Respondent of the rescission." (J-Ex. 3 at p. 3). Thus, based on the GC's position, because no backpay is sought, the agreement is lawful. This arbitrary position is unfounded.

Even though the GC's position simply makes no sense, analyzing the allegation further leads to the conclusion that the Agreement is not unlawful because: (1) the Agreement does not preclude the filing of unfair labor practice charges; (2) backpay is not a Board "process"; and (3) all authority supports a finding that obtaining redress to employees' statutory claims via means outside of the Board's processes is lawful and in fact, encouraged, which logically leads to the conclusion that the GC's position has no merit and cannot be sustained.

A. The Agreement Allows For The Filing Of Charges

The Board has found that an agreement entered into by an employer that prohibits Board charge-filing violates Section 8(a)(1) of the Act. *See, e.g.*, *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 5 (2016). Here, the stipulated issue does not allege an interference with filing unfair labor practice charges. (Stipulation at pp. 3-4). It cannot. The Agreement explicitly states and asks employees to acknowledge that they are not "barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board (NLRB) . . ." (J-Ex. 6).

As Chairman Miscimarra explained, there is a clear distinction between an agreement that requires the arbitration of statutory claims from an agreement that interferes with the filing charges: "this is different from an agreement that interferes with the *right to file a Board claim.* The protection afforded to Board charge-filing is important because the filing of a charge is prerequisite to Board review of unfair labor practice issues. Consequently, an agreement that prohibits Board charge-filing violates Section 8(a)(1) if entered into by an employer, and Section 8(b)(1)(A) if entered into by a union." *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 5 (2016) (Miscimarra, P., dissenting). However, "arbitration agreements may lawfully encompass NLRA claims, and such agreements are *not* prohibited under the Act." *Id.* Accordingly, because the Agreement does not interfere with the filing of charges, it is not unlawful.

B. Backpay Is Not A Board Process — It Is A Remedy

The GC misguidedly contends that employees are restricted in their "access to Board processes" by "prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings." (J-Ex. 3). The GC's position is specious because nothing in the Agreement restricts employees from filing charges, participating in the investigation of the charges, including by providing documentary evidence, providing affidavits, and making witnesses available to the Regional offices, testifying at hearings, or assisting their coworkers with their unfair labor practice charges. *See generally NLRB Casehandling Manual*, Part 1, Unfair Labor Practice Proceedings, § 10140 (Feb. 2017). These are the Board's processes.

Backpay, on the other hand, is a remedy. Indeed, backpay, is not guaranteed and in most cases is not awarded, unless backpay is calculated to be owed, such as when the Board finds that an employee was unlawfully terminated. *Id.* at § 10130.2. The Board's other remedies include,

among other things, notice postings, notice readings, and requiring unions and employers to bargain. *Id.* at §§ 10131.1; 10131.6; 10132.

Moreover, under the NLRB, the charging party is not guaranteed any process or any remedy. The NLRB retains the right to prosecute the case and settle the case as the Region sees fit. *See, e.g.*, § 10122 ("Following a determination not to issue complaint and absent withdrawal of the charge by the charging party, the Regional Director will . . . dismiss the charge. . ."); §10140.3 ("In cases involving individuals not represented by a union or an attorney, the Board agent should make known to the charging party the *Regional Office' willingness* to participate in any settlement discussions and its availability for consultations as to the requirements of a Board settlement . . ."). Accordingly, having access to the Board's processes has nothing to do with obtaining a specific remedy; no specific remedy is guaranteed.

C. All Authority And The NLRB's Practices Support A Finding That Obtaining Redress To Employees' Statutory Claims Outside Of The Board's Processes Is Lawful And Encouraged

Finally, Supreme Court authority, the Act, Board precedent and the Board's practices support Respondent's position that this allegation has no merit and must be dismissed. Seeking redress outside of the Board's processes does not equate with being restrained in participating in the Board's processes.

The Supreme Court has long held that claims arising out of statute can be lawfully resolved through arbitration. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). As the Supreme Court articulated:

> The decision to resolve [statutory] claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace … discrimination; it waives only the right to seek relief from a court in the first instance. . . This court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of

> congressional enactments giving employees specific protection against discrimination prohibited by federal law.

Id. 266 (citation and internal quotation marks omitted). While in *14 Penn Plaza*, the Supreme Court held that a collective bargaining agreement between a union and an employer could lawfully provide for the arbitration of claims arising out of a statute, the Supreme Court carefully noted that: "[n]othing in the law suggest a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." (referencing *Gilmer* for the position that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.") *Id.* at 258. Therefore, the Supreme Court has made clear that individuals can enter into contracts through which they can agree to arbitrate statutory claims and obtain any warranted monetary relief through arbitration. Hence, it does not follow that an employer would violate the Act by entering into the very agreements the Supreme Court has ruled parties can enter into to redress their statutory claims.

The NLRA's statutory language also supports finding that this allegation must be dismissed. More specifically, Section 10(a) shows that Congress favored the parties entering into agreements to adjust or resolve their statutory claims by means other than through the Board's processes. Section 10(a) states:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

29 U.S.C. § 160(a) (emphasis provided). Therefore, "Section 10(a) of the Act guarantees that the Board always has authority to address and resolve unfair labor practice charges, *even though a private agreement may provide for the adjustment or resolution of these claims in arbitration.*" *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 5 (2016) (Miscimarra, P., dissenting)

(emphasis provided). As set forth above, Section 9(a) of the Act also gives employees the right as "individual[s]" to "present" and "adjust" grievances "at any time." 29 U.S.C. § 159(a). Thus, the statute provides for the adjudication of statutory claims outside of the Board's processes.

Board precedent also supports finding that no violation exists in the instant case. The Board has historically had a practice of deferring to arbitration. *See, e.g.*, *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) (setting forth the Board's standard on post-arbitration deferral); *Collyer Insulated Wire*, 192 NLRB 837 (1971) (setting forth the Board's standard on pre-arbitration deferral). Indeed, in a recent case, *Babcock & Wilcox Construction*, while the Board changed the standard for deferring to arbitration, the Board continued its policy of deferring cases to arbitration. 361 NLRB No. 132 (Dec. 15, 2014). Although the Board's precedent has focused on the arbitration of claims through a grievance and arbitration process set forth in a collective bargaining agreements, as set forth above, the Supreme Court has noted that no distinction exists between these agreements to arbitrate via a collective bargaining agreement and those agreements entered into by individuals. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). Indeed, Chairman Miscimarra has recently addressed the applicability of the Board's holding in *Babcock & Wilcox* to cases in which the agreements are entered by individuals, rather than by unions:

> As I explained in *Ralph's Grocery*, *GameStop Corp.*, and *Applebee's Restaurant*, decades of case law--including the Board's recent decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014)--establish that parties may lawfully agree to submit NLRA claims to arbitration, provided that the agreement does not otherwise interfere with NLRB charge filing. Such an agreement does not unlawfully prohibit the filing of charges with the NLRB, particularly when the right to do so is expressly stated in the agreement itself. In this case, the Agreement expressly provides that "claims may be brought before an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims may include without limitation claims or charges brought before . . . the National Labor Relations Board.

Adecco USA, Inc., 364 NLRB No. 9, slip op. at 9 (May 24, 2016) (Miscimarra, P., dissenting); *see also Ralph's Grocery Co.*, 363 NLRB No. 128 (2016) ("Indeed, the Board's decision in *Babcock & Wilcox Construction* leaves no doubt that NLRA claims can be made subject to a mandatory arbitration award. The Board majority in *Babcock* stated that, as a prerequisite to affording deference to any resulting arbitration award, the Board would require the parties to have "explicitly authorized" the arbitrator "to decide the unfair labor practice issue." 361 NLRB No. 132, slip op. at 5 (emphasis added)). Given that the Board defers to arbitration awards and that the Supreme Court has found no distinction between parties deferring their statutory claims to arbitration pursuant to a collective bargaining agreement or as individuals entering into their own contracts, this precludes a finding that Kelly's agreement is unlawful.

Finally, the NLRB's procedures do not establish any basis for finding that the adjudication of statutory claims via arbitration somehow violates the Act. Regional offices allow charging parties to withdraw their charges for various reasons, including in response to the parties reaching a non-Board settlement. *NLRB Casehandling Manual*, Part 1, Unfair Labor Practice Proceedings, § 10140 (February 2017) ("In addition to Board settlements, unfair labor practice charges may be resolved through *a specific agreement between the parties*, including grievance settlements, or as a result of unilateral action taken by the charged party which satisfies the charging party. Non-Board adjustments result in the withdrawal of the charge or, in limited circumstances, dismissal.") This shows again that the NLRB has a practice of allowing charging parties to settle their disputes outside of the Board's processes. *Id.* at §§ 10124; 10124.1 ("Unfair labor practice cases may be resolved through informal or formal Board settlement agreements or through non-Board adjustments." "It is the policy of the Board and the General Counsel to actively encourage the parties to reach a mutually satisfactory resolution of

issues at the earliest possible stage."). Given that the NLRB's Casehandling Manual allows individuals to settle their own statutory claims, even after filing charges, it doesn't follow that employees cannot arbitrate their statutory claims and seek economic relief through arbitration. If such was the case, the Casehandling Manual sections concerning withdrawals and non-Board settlements would also run afoul of the Act.

Moreover, backpay awards under the NLRB are also subject to negotiation and thus, show that there is no difference between proceeding through the NLRB's processes or obtaining a resolution outside of the Board's processes--both are subject to negotiation:

> The backpay calculations should be made consistent with Agency policy and methods as set forth in Compliance Manual and relevant General Counsel memoranda. For guidance, including clearance from the Division of Operations-Management, concerning backpay settlements amounting to less than 80 percent of net backpay, see Sec. 11752 and Secs. 10592.1, .4 and .8 of the Compliance Manual.

Id. at § 10130.2. The Casehandling Manual makes clear that the NLRB can accept backpay settlements that are under 80 percent of the calculated bakpay amount. *Id.* There is no guarantee that a charging party will obtain 100% of the calculated backpay amount by proceeding through the Board's processes. In fact, Administrative Law Judge Steven Fish noted how arbitrary and inconsistent the Board's backpay settlements really are:

> [T]he Board and/or judges have frequently approved settlements, which did not meet the 80% figure. Indeed, in *Independent Stave*, itself, the Board approved a settlement, which included backpay of only 10% of the amount due, although the agreement did include reinstatement for three discriminatees. See also *American Pacific Concrete Pipe Co.*, 290 NLRB 623, 623-624 (1988) (in a backpay hearing, where unlike the instant case, liability had already been determined, Board approves settlement over the objection of General Counsel of backpay of slightly under 50%; payment of $20,000, where the backpay specification claimed that discriminatee was owed $41,610); *Service Merchandise Co.*, 299 NLRB 1132, 1134 (1990) (one of the discriminates waived reinstatement and accepted 50% of backpay); *Combustion Engineering*, supra, 272 NLRB at 217 (Board approves settlement agreement reached between union and employer settling grievances, which encompassed complaint violations, providing for no backpay

but with reinstatement); *Central Cartage Co.*, 206 NLRB 337, 337-338 (1973) (Board approves settlement negotiated between the union and employer, which provided for no backpay for alleged discriminatee and included agreement as to what work alleged discriminatee would perform); *Roselle Shoe Corp.*, 135 NLRB 472, 475-478 (1962) (Board approves settlement over objection of charging party, where backpay agreed upon was $12,000 for each discriminatee although if charging party's computation is accepted there would be $80,000 due for each discriminatee); *Insulation Sales Inc.*, 1998 WL 1985159 (NLRB Division of Judges 1998) (judge approved settlement between employer and charging party/discriminatee, providing for backpay of approximately one-third of what would have be due and waiver of reinstatement; General Counsel, although objecting to approval of withdrawal request, did not appeal judge's decision); *Ribbon Sumyoo Corp.*, 1992 WL 1465636 (NLRB Division of Judges 1992) (judge approves non-Board settlement providing for approximately 45% of backpay, plus waiver of reinstatement, over objection of General Counsel; again, no appeal filed by General Counsel to judge's approval of agreement and granting motion to withdraw charges).

Gormet Toast Corp., Case No. 29-CA-30404, 2011 WL 2433351, at *7 (June 16, 2011).

Accordingly, the GC's position is unsupported by Supreme Court authority, the statutory language of the NLRA, and the Board's processes and practices. There is simply no basis for finding that the Agreement interferes with a charging party's access to the NLRB's processes.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the Complaint should be dismissed in its entirety.

Respectfully submitted,

KELLY SERVICES, INC.

By: Gerald L. Maatman, Jr.

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(312) 460-5000

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of this brief to be served upon the Administrative Law Judge, the Regional Director and Counsel for the General Counsel via electronic filing and the following counsel of record in the manner listed below on this 15th day of May, 2017:

Marielle Macher, Esq. (via FedEx and Email)
Counsel for the Charging Party
Community Justice Project
118 Locust Street
Harrisburg, PA 17101-1414
mmacher@cjplaw.org

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KELLY SERVICES, INC.

and Case No. 4−CA−171036

T. JASON NOYE, an Individual

Lea Alvo-Sadiky, Esq.,
for the General Counsel,
Gerald L. Maatman, Jr., Esq. (Seyfarth Shaw LLP), for the Respondent.
Marielle Macher, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Robert A. Giannasi, Administrative Law Judge. This case was submitted to me by virtue of a joint motion and stipulation pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining as a condition of employment for all employees an arbitration agreement that (1) requires employees to waive their right to maintain class or collective actions in all forums, whether arbitrator or judicial, with respect to their wages, hours or other terms and conditions of employment; and (2) restricts employee access to Board processes by prohibiting employees from receiving back pay or other monetary compensation through Board proceedings. Respondent filed an answer denying the essential allegations in the complaint. All parties filed briefs in support of their positions.[1]

[1] The parties agreed that their Stipulation of Facts, with attached exhibits, constitutes the entire record in this case and that no oral testimony is necessary or desired.

Based on the stipulation and the stipulated record, as well as the briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers. In conducting its operations during the past 12-month period, Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey. At all times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement, and in the record as Joint Exhibit 6*)* which includes, inter alia, the following provisions:

> 1. **Agreement to Arbitrate**. Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration instead of going to court, for any "Covered claims that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.
>
> 2. **Claims Subject to Agreement**. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)
>
> 3. **Exclusions from Agreement**. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, workers' compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services

from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL") and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. **Waiver of Class and Collective Claims**. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no Arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of class, collective, or representative proceeding.

16. **Savings Clause & Conformity Clause**. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive form for such claims.

All documents attached as exhibits are true and correct copies of the documents described. The parties agree to the authenticity of the exhibits.

Statement of Issues

Based on the above factual stipulations, the parties agree that the legal issues to be resolved in this matter are whether Respondent's maintenance of the Arbitration Agreement described above violates Section 8(a)(1) of the Act because it (i) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums,

whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment; and (ii) interferes with and restricts employees access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

Analysis

Waiver of Collective Actions

The Board has held that employer rules prohibiting employees, as a condition of employment, from pursuing collective actions in arbitrations or law suits violate Section 8(a)(1) of the Act because they interfere with collective rights set forth in Section 7 of the Act. *D.R. Horton*, *Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (5th Cir. 2013); and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) enf. denied 808 F. 3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017). See also *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted 137 U.S. 809 (2017).

Paragraph 8 of the Arbitration Agreement, which is a condition of employment, clearly precludes employees from pursuing employment-related class or collective actions both in arbitrations and in court proceedings. Thus, the Board's rulings in *D.R. Horton* and *Murphy Oil* require me to find that the Arbitration Agreement violates Section 8(a)(1) of the Act.[2]

Restriction Against Filing Board Charges That Could Provide Monetary Remedies

The Board has held that a mandatory arbitration policy such as the one in this case discussed above also violates Section 8(a)(1) if employees "would reasonably believe that the policy interferes with their ability to file a Board charge or otherwise access the Board's processes." *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. 1 (2016). In that case, the employer argued, as Respondent does here, that another part of the policy provided an adequate defense to the alleged violation because it permitted employees to file charges with the Board. But the Board rejected that defense because, overall, the policy broadly required arbitration for all employment-related disputes, and the reference to filing charges made the policy ambiguous. The Board noted that any ambiguity had to be construed against the promulgator of the policy, particularly because employees reading the policy are lay people, not lawyers able to make sophisticated distinctions such as those set forth in the policy. Thus, in finding a violation, the Board concluded that employees could reasonably read the retention of the right to file Board charges as "illusory." Id. slip op. 2. As the Board further stated (Id. slip op. 3):

[2] I am bound by existing Board law unless reversed by the Board itself or by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). I am also bound by the Board's rejection, in *Murphy Oil* and *D.R. Horton* of the arguments made in Respondent's brief to me in support of the dismissal of this aspect of the complaint.

> To be meaningful, the right to file charges with the Board must entail the rights to have the Board exercise its statutory powers under Section 10 of the Act: i.e., to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures. An employer may *not* lawfully require individual employees to arbitrate unfair labor practice claims that would otherwise be resolved by the Board under the Act's procedures. To do so necessarily interferes with employee's statutory right of access to the Board.

Ralph's Grocery governs this case. Here, as in *Ralph's Grocery*, the sweep of the broad mandatory arbitration language trumps any preservation of the right to file Board charges. The mandatory arbitration language is set off in bold type, unlike the rest of the policy. The ambiguity in the reading of the broad overall policy by the lay person employees here is the same as it was in *Ralph's Grocery*. Thus, here, as in *Ralph's Grocery*, the Arbitration Agreement's token recognition of the right to file Board charges is "illusory." And the overall Agreement can reasonably be read to inhibit the filing of Board charges. See also *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. 2-3 (2016).

This is an even stronger case for a violation than *Ralph's Grocery*. Paragraph 3 of the Arbitration Agreement permits employees to file Board charges, as it did in *Ralph's Grocery*, but it also explicitly prohibits them from recovering money damages in a Board proceeding, a restriction that was not present in *Ralph's Grocery*. It is difficult to envision how, once the Board's processes have been invoked, the Arbitration Agreement could preclude the Board from exercising its full statutory powers, including its remedial authority. The Board's remedies, of course, often provide for back pay to make employees whole for discrimination and other unfair labor practices found by the Board. Back pay is a specific statutory remedy set forth in Section 10(c) of the Act. Because the Board enforces public, not private, rights, it is doubtful that any private rule could preclude the Board from providing a monetary remedy authorized by a statute of the United States. But the bottom line here is that a reasonable reading of the Arbitration Agreement's prohibition against monetary remedies from the Board is an added inhibition against the filing of charges. Why file a charge in a case where back pay is the normal remedy if you cannot get monetary relief? Accordingly I find that the Arbitration Agreement precludes full recourse to the Board and thus violates Section 8(a)(1) of the Act in this additional respect.

Although it lists four alleged reasons for the legality of the Arbitration Agreement, Respondent's brief does not provide a persuasive defense to this part of the complaint. All of its reasons run contrary to *Ralph's Grocery*. Its first reason is hard to understand, but, to the extent that it suggests that if "no back pay is sought" in a Board proceeding the Arbitration Agreement is "lawful" (Br. 11-12), it fails to account for the restriction of a full Board remedy in those cases where back pay is a normal remedy. The second reason—that the Agreement allows for the filing of charges (Br. 12-13)—is likewise contrary to the rationale of *Ralph's Grocery* that preservation of the right to file charges is illusory where the thrust of the unlawful policy is to require arbitration in all employment-related disputes. The significance of Respondent's third reason—that

denying statutory back pay relief to employees is permissible because back pay is a remedy and not a procedure (Br. 13-14)—escapes me. Respondent seems to allege that because a back pay remedy is not guaranteed its denial to employees who are nevertheless free to file charges does not interfere with Board processes. But, although nothing in life is guaranteed, a back pay remedy is the normal remedy where an appropriate violation is found and circumstances warrant it. Nor is there any distinction in Board jurisprudence that permits access to Board processes and exclusion of Board remedies where appropriate. This is made clear by the Board's language in *Ralph's Grocery,* set forth above, that access to Board processes includes the right to "pursue appropriate relief" through the Board. A back pay remedy is thus part of Board processes. Respondent final reason—that because deferral to arbitration is permitted in some circumstances, it should be permitted here (Br. 14-19) is without merit. As the Board made clear in *Ralph's Grocery*, deferral to arbitration is a discretionary policy of the Board that has been used only when the arbitration provision has been the result of a collectively bargained agreement, which is not the case here. 363 NLRB No. 128, slip op. 3.

CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that employees reasonably would believe bars or restricts their right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

3. The above violations constitute unfair labor practices within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and deist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. As I have concluded that the Arbitration Agreement is unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted

ORDER

The Respondent, Kelly Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing a mandatory arbitration policy that waives the right of employees to maintain class or collective actions in all forms, whether arbitral or judicial.

(b) Maintaining or enforcing a mandatory arbitration policy that employees reasonably would believe bars or restricts the right of employees to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, or to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised Arbitration Agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at all facilities where the Dispute Resolution and Mutual Agreement to Binding Arbitration applied copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site,

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by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 23, 2017.

Robert A. Giannasi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mandatory arbitration policy that waives your right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory arbitration policy that you reasonably could believe bars or restricts your right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise or the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the Dispute Resolution and Mutual Agreement to Binding Arbitration to make it clear to all employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict their right to file charges and seek remedies including back pay where appropriate, before the National Labor Relations Board.

WE WILL notify all employees of the rescinded or revised Dispute Resolution and Mutual Agreement to Binding Arbitration, and WE WILL provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

KELLY SERVICES, INC.
(Employer)

DATED: _____BY: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-142795 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KELLY SERVICES, INC. and T. JASON NOYE, an Individual	Case 04-CA-171036

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., May 23, 2017**.**

By direction of the Board:

Gary Shinners

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **June 20, 2017.**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.,

and **Case 04-CA-171036**

T. JASON NOYE, an Individual

RESPONDENT KELLY SERVICES, INC.'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulation, the Respondent, Kelly Services, Inc. ("Kelly"), respectfully submits the following Exceptions to the May 23, 2017 Decision of Administrative Law Judge Robert A. Giannasi ("ALJ"):

1. The ALJ's finding that the class action waiver in Respondent's Dispute Resolution and Mutual Agreement to Binding Arbitration ("Agreement") violates the National Labor Relations Act. (ALJD at 4).

2. The ALJ's finding that the Respondent's Agreement restricts against the filing of Board charges that could provide monetary remedies. (ALJD at 4-6).

   a. The ALJ's finding that an ambiguity exists concerning the language that explicitly informs employees as to their rights to file charges with the NLRB. (ALJD at 5).

   b. The ALJ's disregard for the actually stipulated issue, which requires a finding that the Agreement "interferes with and restricts employee access to Board processes by

prohibiting Respondent's employees from receiving back pay or other monetary compensation through Board proceedings." (ALJD at 5; Stipulation at 3).

Respectfully submitted,

KELLY SERVICES, INC.

By: Gerald L. Maatman, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of these Exceptions to be served upon the Board and the Region via electronic filing and the following counsel of record in the manner listed below on this 20th day of June, 2017:

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/s/ _____

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.,

And **Case 04-CA-171036**

T. JASON NOYE, an Individual

RESPONDENT KELLY SERVICES, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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June 20, 2017

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RESPONDENT'S BRIEF

Respondent Kelly Services, Inc. ("Respondent" or "Kelly"), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), hereby files this Brief in Support of its Exceptions to the decision of the Administrative Law Judge Robert A. Giannasi ("ALJ"). For the reasons set forth herein, the Respondent respectfully requests that the Board reverse the ALJ's decision and dismiss the Complaint in its entirety.

INTRODUCTION

This case concerns Kelly's Dispute Resolution and Mutual Agreement to Binding Arbitration ("Agreement"). The Agreement provides that employees who sign it will arbitrate their employment-related claims on an individual basis, thereby waiving participation in collective or class actions. (J-Ex. 6).[1] Kelly contends that such Agreement is lawful. Of course, the legality of agreements that contain collective/class action waivers have been the subject of significant litigation with the NLRB and various U.S. Courts of Appeals. The legality of these types of agreements is currently an issue pending review by the U.S. Supreme Court in three consolidated cases, including *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert granted*, S. Ct. No. 16-307 (Jan. 13, 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert granted*, S. Ct. No. 16-285 (Jan. 13, 2017); and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), *cert granted*, S. Ct. No. 16-300 (Jan. 13, 2017) (referred to collectively herein as the "Consolidated Appeals").

Given that the Supreme Court is currently reviewing the legality of such agreements, the Supreme Court – and not the Board – will determine the enforceability of arbitration agreements

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[1] Throughout this brief, references are made to the Stipulation as "Stipulation at ___," to the joint exhibits set forth in the Stipulation as "J-Ex. ___," and to the ALJ's Decision as "ALJD at ___."

containing waivers of class/collective litigation under the National Labor Relations Act ("NLRA" or "Act"). Moreover, the NLRB's position on this issue will be changing given the change in the Presidential Administration.[2] Indeed, on June 16, 2017, the Acting Solicitor General Jeffrey B. Wall ("ASG") filed in the Consolidated Appeals the Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307. In the Brief, the ASG completely disagreed with the Board's position noting, among other things, that "Courts must enforce agreements to arbitrate federal claims unless the FAA's mandate has been overridden by a contrary congressional command or unless enforcing the parties' agreement would deprive the plaintiff of a substantive federal right. Neither of those justifications for non-enforcement is applicable here. The parties' agreements, including their prohibition on classwide or collective proceedings, should therefore be enforced according to their terms." *Id.* at 9. The ASG also noted that the enforcement of the arbitration agreements does not "deprive plaintiffs [in the Consolidated Appeals] of any substantive right under the NLRA." *Id.* at 11. Accordingly, while analysis is presented below addressing this allegation and Kelly believes the Supreme Court will find the NLRB's position to be erroneous

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[2] *See, e.g.*, April 21, 2017 Letter from J. Wall, Acting Solicitor General, to Hon. S. Harris, Clerk of the Supreme Court of the United States at 2-3 ("Appointment by the President of two additional [Board] members therefore could affect the Board's position on the question presented, which in turn could affect the [Supreme] Court's disposition of [the Consolidated Appeals].") (Attached as Exhibit A); *id.* at 3 ("The Acting Solicitor General is engaged in a process of reviewing the position of the United States in these cases. . . . to complete the process of determining the position of the United States, the Acting Solicitor General must fully assess the legal issues that these cases present and consult with new leadership within the government."); June 16, 2017 Brief from J. Wall, Acting Solicitor General, Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307 at 14 ("More specifically, the Board's view that the phrase 'other concerted activities in 29 U.S.C. 157 encompasses participation in collective or class litigation may reflect a permissible interpretation of that language, such that an employer might commit an unfair labor practice by discharging employees who initiated or joined such suits in accordance with other provisions of law. It does not follow, however, that Section 157 expands the range of circumstances in which such litigation can go forward, by allowing employees who validly waived their collective-litigation rights under the FLSA to escape the consequences of that choice. The Board's approach fails to respect the FAA's directive that arbitration agreements should be enforced unless they run afoul of arbitration-neutral rules of contact validity.") (Attached as Exhibit B).

and in conflict with the Federal Arbitration Act ("FAA"), this issue cannot be resolved until the Supreme Court issues its decision in the Consolidated Appeals (unless the Board abandons its current position prior to the Supreme Court's ruling).[3] Consequently, Kelly requests that the Board reserve ruling on this case until the Supreme Court issues its decision.

The Agreement also contains a section explicitly stating that employees can file administrative charges, including charges with the NLRB. (J-Ex. 6; ALJD at 2:40-3:12). The Agreement explains, however, that while employees can file charges with the NLRB, in order to obtain any monetary remedy, those claims must be pursued through arbitration.

On May 23, 2017, the ALJ issued the decision in the instant case, finding that both the Agreement's mandatory collective/class action waiver and the provision of the Agreement regarding the filing of charges violate the Act. With respect to the first issue – the mandatory collective/class action waiver – the ALJ, provided no analysis, and simply stated that the waiver was unlawful under existing Board precedent. (ALJD at 4:18-22).

With respect to the second issue – the provision of the Agreement regarding the filing of charges – the ALJ also found a violation based on Board precedent, in particular finding that the Agreement was ambiguous. (*Id.*) Respondent disagrees with this finding and, as explained below, also objects to the ALJ's disregard for the issue to which the parties actually stipulated. While the ALJ initially correctly identified the stipulated issue as whether or not the Agreement is unlawful because it "interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings," the ALJ proceeded to determine whether or not the Agreement

[3] Kelly requested that this allegation be stayed pending the Supreme Court's decision. The Region declined to grant a stay.

interferes with the filing of charges – an issue to which that the parties did not stipulate. (*Compare* Stipulation at 3, *with* ALJD at 3-4).

Kelly respectfully disagrees with both of the ALJ's findings. As set forth more fully below, Supreme Court authority not only supports the resolution of statutory claims via arbitration, but the NLRA's statutory language, the NLRB's Case Handling Manual, and the Board's processes and procedures all show that both allegations must be dismissed.

FACTS AND ISSUES

I. The Stipulated Facts

1. "Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers. In conducting its operations during the past 12-month period, Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act." (Stipulation at 1-2; ALJD at 2).

2. "Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees [the Agreement] (attached as J-Ex. 6), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)

> **3. Exclusions from Agreement.** The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.
>
> **8. Waiver of Class and Collective Claims.** Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding."

(Stipulation at 2-3; ALJD at 2-3).

II. The Stipulated Issues

The stipulated issues are the following: "whether Respondent's maintenance of the Arbitration Agreement described above in Paragraph 4 violates Section 8(a)(1) of the Act because it: (i) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment; and (ii) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary

compensation through Board proceedings." (Stipulation at 3).

ARGUMENT

I. The Agreement's Class Action Waiver Does Not Violate The Act

The ALJ provided no analysis regarding his finding of a violation with respect to the Agreement's mandatory collective/class action waiver. Instead, the ALJ merely cited to the Board's decisions in *D.R. Horton* and *Murphy Oil*. (ALJD at 3). Thus, Respondent explains below why the Board's precedent is erroneous and should not be followed here.

A. The FAA Requires That Arbitration Agreements Be Enforced According To Their Terms

Contrary to the NLRB's position, the FAA and not the NLRA controls whether or not the Arbitration Agreement is lawful. The NLRB's insistence, via its precedent, on attempting to regulate beyond its statutory jurisdiction requires the Supreme Court to admonish it as it has done when the NLRB has tried to step outside of its bounds. *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 144 (2002) ("Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."); *id.* ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."); *Southern S.S. Co. v. NLRB,* 316 U.S. 31, 47 (1942) ("Particularly relevant to this dispute is that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

The FAA is "[t]he background law governing questions relating to the enforcement of an arbitration provision, even when other federal statutes are at issue." *CompuCredit Corp. v.*

Greenwood, 565 U.S. 95, 97 (2012) (internal quotation marks omitted). It "establishes 'a liberal federal policy favoring arbitration agreements.'" *Id.* at 669 (internal citation omitted). Under the FAA, "[P]rivate agreements to arbitrate are enforced according to their terms," including when those terms foreclose collective arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681-82 (2010) (citations omitted). Moreover, the type of arbitration "envisioned by the FAA" is "bilateral" (individual) arbitration, not class arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348, 351 (2011).

Under the FAA, the default rule is enforceability. Agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987); *see also, e.g., Moses Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (explaining that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

The FAA establishes a presumption in favor of enforcing arbitration agreements as written, and thus for decades the Supreme Court has consistently upheld the FAA's policy favoring enforcement of arbitration agreements. *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *CompuCredit*, 565 U.S. 95; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Mitsubishi Motors Corp. v. Soler Chryslster-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter*

Reynolds v. Byrd, 470 U.S. 213 (1985); *Moses H. Cone v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

The presumption of arbitrability and the enforceability of agreements to arbitration may be overcome only under two exceptions: (1) under the FAA's "Savings Clause," 9 U.S.C. § 2, whereby an arbitration agreement may be revoked on a ground that would invalidate any contract, *see, e.g.*, *Concepcion*, 563 U.S. at 339-340; or (2) if another federal statute contains a "congressional command" that is "contrary" to the FAA's enforcement mandate. *See, e.g.*, *CompuCredit Corp.*, 132 S. Ct. at 669. This contrary congressional command cannot be "obtuse," but rather must indicate Congress's contrary intent with some "clarity." *Id.* at 672. Neither one of these grounds applies here.

1. The FAA's Savings Clause Does Not Support The GC's Position

The FAA's savings clause reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the *revocation* of any contract.

9 U.S.C. § 2 (emphasis added). The FAA's savings clause allows courts to decline to enforce arbitration agreements based on generally applicable contract formation defenses; that is, those that provide "for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). As former Board Member Johnson noted:

> The Supreme Court has made clear that the FAA savings clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. But the Court has also made clear that the FAA savings clause does not permit defenses that, while neutral on their face, would have a disproportionate impact on arbitration agreements. *And the Court has*

made equally clear that any provision requiring classwide litigation is just such a defense.

Murphy Oil, USA, Inc., 361 NLRB No. 72, slip op. at 46 (2014) (Johnson, Harry I., III, dissenting) (emphasis in original) (citations and quotation marks omitted). The GC here does not seek to invalidate of the Agreement based on a contract defense. The ALJ's decision also does not address a contract defense. (*See generally* ALJD); *see, e.g.*, *Concepcion*, 563 U.S. at 355-57 (Thomas J., concurring) ("Contract defenses unrelated to the making of the agreement . . . could not be the basis for declining to enforce an arbitration clause. . . . Refusal to enforce a contract for public-policy reasons does not concern whether the contract *was properly made*.") (emphasis added).

In fact, the Supreme Court's precedent in *Concepcion* makes clear that the savings clause does not apply to the NLRB's position that an agreement waiving class or collective action makes the savings clause applicable. *D.R. Horton v. NLRB*, 737 F. 3d 344, 359 (5th Cir. 2013) (analyzing *Concepcion*). *Concepcion* concerned a California statute that prohibited class action waivers in arbitration agreements. 563 U.S. at 351-52. The Supreme Court considered whether the fact that the statute prohibited class-action waivers in both judicial and arbitral proceedings meant that the prohibition was covered under the FAA's savings clause. *Id.* The Court held that the savings clause was inapplicable and the California statute was preempted by the FAA because: "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," and "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* Like in *Concepcion*, the NLRB's position with respect to arbitration agreements that waive class/collective litigation is to "disfavor arbitration." *D.R. Horton*, 737 F. 3d at 359. "Requiring a class mechanism is an actual

impediment to arbitration and violates the FAA. The savings clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement." *Id.* at 360. Accordingly, just as in *Concepcion*, the NLRB's position must give way to the FAA's purpose of encouraging and enforcing arbitration agreements.

More fundamentally, however, the FAA's savings clause is inapplicable here, because the FAA's savings clause applies to inferior laws; it has no application to other federal statutes like the NLRA. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *NLRB v. Alt. Entm't, Inc.*, No. 16-1385, 2017 WL 2297620, at *18 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part) (noting that the FAA's savings clause does not save "other federal statutes enacted by the same sovereign"). Indeed, the Supreme Court has never applied the FAA's savings clause to a purported conflict between the FAA and another federal statute.

Thus, absent a contrary congressional command trumping the FAA, the Agreement must be enforced according to its terms. The NLRA contains no such command.

2. The NLRA Contains No "Contrary Congressional Command"

In *American Express Co. v. Italian Colors Restaurants*, 133 S. Ct. 2304 (2013), a case decided *after* the Board's decision in *D.R. Horton*, 357 NLRB 2277 (2012), the Supreme Court held that a class action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the other federal statutes. Thus, even after *D.R. Horton*, a congressional command must be found. None exists that would apply in favor of the GC's case.

Under the standards set forth by the Supreme Court, the NLRA contains no "contrary congressional command" barring class waivers in arbitration agreements. *CompuCredit*, 565 at 97-98; *see Morris v. Ernst & Young, LLP*, 834 F.3d 975, 987 (9th Cir. 2016) (Ikuta, J., dissenting). To find that such a command exists, the command "will be discoverable in the text,"

the statute's "legislative history," or by the finding of "an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. However, despite these factors, Courts must take into account "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26.

The NLRA's text does not support the Board's position. Section 7 of the NLRA does not expressly prohibit class waivers: it grants employees the right "to engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To evince a contrary congressional command, therefore, Section 7 would have to actually give employees the substantive right to arbitrate or litigate a dispute as a class or collective action. But that interpretation is not compelled by the statutory language. In fact, the statutory language supports the opposite finding. Section 9(a) of the Act gives employees the right as "individual[s]" to "present" and "adjust" grievances "at any time." 29 U.S.C. § 159(a). Similarly, Section 10(a) of the Act states that the Board's power is limited by "other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a). As Chairman Miscimarra summarized:

> However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time." This aspect of Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time." This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7.

AWG Ambassador, LLC, 363 NLRB No. 137, slip op. at 2 (Feb. 25, 2016) (Miscimarra, P., dissenting); *see also Prime Healthcare Paradise Valley, LLC*, 363 NLRB No. 169, slip op. at 3 (Apr. 22, 2016) (Miscimarra, P., dissenting). Accordingly, it follows that "[n]o court decision

prior to the Board's ruling [in *D.R. Horton*] had held that the Section 7 right to engage in 'concerted activities for the purpose of . . . other mutual aid or protection' prohibited class action waivers in arbitration agreements.'" *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013).

The legislative history also does not support the Board's position. As the Fifth Circuit found, there is no legislative history of a "disavowal of arbitration." *D.R. Horton*, 737 F. 3d at 361. "[T]he legislative history of the NLRA, and its predecessor, the National Industrial Recovery Act of 1933, only supports a congressional intent to 'level the playing field' between works and employers by empowering unions to engage in collective bargaining." *Id.* Chairman Miscimarra explained:

> When enacting the NLRA in 1935, if Congress had intended to guarantee the availability of one or more of the above procedures regarding litigation of employees' non-NLRA claims, one would reasonably expect this intent to be reflected in the Act or its legislative history. One would also expect there to be guidance as to which class-type procedures, regarding what stages, of non-NLRA litigation are guaranteed. However, the Act and its legislative history are completely silent as to these issues. Section 8(a)(1) and (b)(1)(A) merely prohibit restraint and coercion regarding rights guaranteed in section 7. And Section 7 confers protection triggered by concerted activity for the purpose of mutual aid or protection, which ... may arise from non-NLRA claims and complaints *regardless of whether or not class-type procedures are applicable.*

Murphy Oil, USA, Inc., 361 NLRB No. 72, slip op. at 27 (2014) (internal quotation marks omitted). Furthermore, as Chairman Miscimarra noted, it is clear that Congress did not intend to use the NLRA to preclude waivers of class and collective actions because class actions did not exist at the time of the NLRA's adoption. *Murphy Oil*, 361 NLRB No. 72, slip op. at 28 (2014) (Miscimarra, P., dissenting) (noting that "modern class action practice" did not exist until about three decades after the NLRA's adoption).

Similarly, there is no basis for finding an inherent conflict between the FAA and the NLRA. As the Fifth Circuit explained:

> We know that the right to proceed collectively cannot protect vindication of employees' statutory rights under the ADEA or FLSA because a substantive right to proceed collectively has been foreclosed by prior decisions. . . The right to collective action also cannot be successfully defended on the policy ground that it provides employees with greater bargaining power. 'Mere inequality in bargaining power . . . is not sufficient reason to hold that arbitration agreements are never enforceable in the employment context.' . . . The end result is that the Board's decision creates either a right that is hollow or one premised on an already-rejected justification.

Id. at 361 (internal citations omitted).

Moreover, the Board's position makes no sense. The Board claims that the right to class/collective action is a substantive right under the Act. *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 6 (2014). Former Member Johnson explained the absurdity with the majority's position:

> This error results in the tautology that such rights are Section 7 rights because they are "substantive," and thus Section 7 protects them as substantive rights. The Board cannot make something that walks like, looks like, and sounds like a procedural duck into a substantive swan, merely by declaring that it falls into the ambit of Section 7.

Id., slip op. at 6. There is no support for the Board's position. Participation in a class or collective action is not a substantive right, but rather, is a procedural device. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 ("Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision."). Indeed, the Supreme Court has made clear that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). "Thus, while a class action may lead to certain types of remedies or relief, a class action *is not itself a remedy*." *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643 (5th Cir. 2012) (emphasis added).

If the NLRA were indeed the source of employees' putative right to proceed as a class or collective action in litigation or arbitration, employees could commence such proceedings

directly under the NLRA. *See Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 311 (D. Mass. 2016). They presumably could have done so even before the federal rules were revised to provide for class litigation of legal claims. *See generally Italian Colors*, 133 S. Ct. at 2309-10 (describing the advent of Federal Rule of Civil Procedure 23). Yet, employees have never sought class or collective remedies under the NLRA, because no such right exists.

Moreover, if Section 7 of the Act gives employees the right to proceed in a class or collective action, Section 8 makes it an unfair labor practice for an employer "to interfere with" that "right[ ]." 29 U.S.C. § 158(a)(10). The logical consequence of this is that any employer opposition to employees' efforts to certify a class or collective action or arbitration "interfe[s] with" the employees' "right[ ]." *See id.*; *Bekele*, 199 F. Supp. 3d at 312 ("If the ability to pursue a class action is a substantive right protected by Section 7, could an employer oppose class certification without "interf[ing] with" that right? Would the filing of an opposition to class certification automatically amount to a violation of Section 8?"). That would make certification of class or collective actions automatic when brought by employees against their employer. *See Bekele*, 199 F. Supp. 3d at 311-312 (making a similar observation); *see also Alternative Entertainment*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part) (noting that such a result would "create[] a bizarre alchemy," because "[i]t would mean that Section 7 guarantees an employee the right to pursue a collective action" that the underlying statute . . . permits to be waived"). Nothing in the NLRA or elsewhere suggests that this "bizarre alchemy" was Congress's intended result.

Accordingly, the NLRA does not give employees a substantive, non-waivable right to proceed in class or collective arbitration, and certainly not a right that trumps the Supreme Court's FAA jurisprudence demanding exception that arbitration agreements are to be enforced

as written. Therefore, the Board must find, as Circuit Courts have already found, that the Board's position cannot be sustained. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert granted*, U.S. S. Ct. No. 16-307 (Jan. 13, 2017); *D. R. Horton v. NLRB*, 737 F. 3d 344 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013).

II. The Agreement Does Not Interfere With The Board's Processes

A. The Agreement Allows For The Filing Of Charges

According to the GC and the ALJ's findings, the Agreement "interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings." (J-Ex. 3; ALJD at 5-6). This finding should be reversed as meritless because the Agreement explicitly provides for the filing of NLRB charges. The Agreement specifically states:

> I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

(J-Ex. 6; ALJD at 2-3). Thus, while the Agreement explains that employees are able to file charges with governmental agencies, which may process the charges, the employees must pursue their claims through arbitration to obtain any monetary relief.

The Board has found that an agreement entered into by an employer that prohibits Board charge-filing violates Section 8(a)(1) of the Act. *See, e.g., Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 5 (2016). Here, the stipulated issue does not allege an interference with filing

unfair labor practice charges. (Stipulation at 3-4; ALJD at 4). It cannot. The Agreement explicitly states and asks employees to acknowledge that they are not barred from filing an administrative charge with such governmental agencies as the NLRB:

> **3. Exclusions from Agreement.** The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

(J-Ex. 6).

As Chairman Miscimarra explained, there is a clear distinction between an agreement that requires the arbitration of statutory claims and an agreement that interferes with the filing charges:

> [T]his is different from an agreement that interferes with the *right to file a Board claim*. The protection afforded to Board charge-filing is important because the filing of a charge is prerequisite to Board review of unfair labor practice issues. Consequently, an agreement that prohibits Board charge-filing violates Section 8(a)(1) if entered into by an employer, and Section 8(b)(1)(A) if entered into by a union.

Ralph's Grocery Co., 363 NLRB No. 128, slip op. at 5 (2016) (Miscimarra, P., dissenting) (emphasis in original). However, "arbitration agreements may lawfully encompass NLRA claims, and such agreements are *not* prohibited under the Act." *Id.* Accordingly, because the Agreement does not interfere with the filing of charges, it is not unlawful.

B. The ALJ Erred In Finding That The Agreement Is Ambiguous

The ALJ nevertheless found a violation. In doing so, the ALJ focused on the Board's decision in *Ralph's Grocery*, 363 NLRB No. 128 (2016), where the Board's majority found that the agreement at issue was ambiguous. In reaching its decision, the Board started with an analysis of the factors set forth under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Accordingly, we do the same here.

Under *Lutheran Heritage Village-Livonia*, a work rule/policy is unlawful if it expressly restricts Section 7 activity. If the rule does not expressly restrict Section 7 activity, the work rule may still be found unlawful but only upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. An employer rule is unlawfully overbroad "when employees would reasonably interpret it to encompass protected activities." *Triple Play Sports Bar & Grill*, 361 NLRB No. 31, slip op. at 7 (Aug. 8, 2014). In determining whether a work rule is unlawful, the Board must, however, "give the rule a reasonable reading" and "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

Here, there is no contention that paragraph 3 of the Agreement expressly restricts Section 7 activity, that the rule was promulgated in response to Section 7 activity, or that the rule has been applied to exercise Section 7 activity. (*See generally* ALJD). Accordingly, the only analysis that is relevant is whether an employee would reasonably construe the language to prohibit Section 7 activity – that is, the filing of a charge. No employee could reasonably find

that the Agreement bars the filing of charges with the NLRB. The Agreement explicitly and unequivocally states that employees can file charges.

In *Solarcity Corp.*, Chairman Miscimarra explained the ridiculous position the Board majority took to find a violation. 363 NLRB No. 83 (Dec. 22, 2015). In that case, the agreement contained in relevant part three sentences: the first contained a class-action waiver; the second stated that the agreement "does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute;" and the third stated that "[s]uch permitted agency claims *include filing a charge or complaint with . . . the National Labor Relations Board.*" *Id.* at slip op. 9-10 (emphasis in original). Based on this explicit language Chairman Miscimarra disagreed with the Board majority's finding that the agreement was ambiguous and thus unlawful because an employee would not know whether he/she could file a charge. Chairman Miscimarra explained:

> Even though the Agreement expressly state employees retain the right to "file a charge or complaint with the National Labor Relations Board," my colleagues make a three-stage argument that the class-action waiver in the Agreements creates "an inherent ambiguity" because (i) the Agreements state that employees "waive any right to pursue or participate in any dispute on behalf of ... any class, collective or representative action, except to the extent such waiver is expressly prohibited by Law," (ii) an NLRB charge sometimes "purports to speak to a group or collective concern," and (iii) the Agreements' class-action waiver would interfere with the filing of charges that speak to group or collective concerns is "expressly prohibited by the law." The problem with this argument is its false, circular premise that the Agreement's class-action waiver can be construed to interfere with the filing of Board charges, despite other language in the Agreements that specifically addressed Board charge-filing and contradicts such a construction. As noted previously, the Agreements categorically *permit* the filing of Board charges--all Board charges, including those that "purport[]to speak to a group or collective concern." Here as well, specialized legal knowledge is not required to understand what the Agreements mean. Rather, only lawyers could argue for the interpretation reflected in my colleagues' three-stage "inherent ambiguity" analysis.

Id. at slip. op. 10 (emphasis in original).

In this case, the ALJ contends that the Agreement's "broad mandatory arbitration language trumps any preservation of the right to file Board charges. The mandatory arbitration

language is set off in bold type, unlike the rest of the policy. The ambiguity in the reading of the broad overall policy by the lay person employees here is the same as it was in *Ralph's Grocery*." (ALJD at 5). A lay person reading the Agreement's plain language, however, would:

> understand that [they are] not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") . . . .

(J-Ex. 6). "[S]pecialized legal knowledge is not required to understand" what the Agreement means, because it "categorically permit[s] the filing of . . . all Board charges." *Solarcity Corp.*, 363 NLRB No. 83 at slip. op. 10 (Miscimarra, P., dissenting).

There is nothing inconspicuous about the exclusions set forth in the Agreement. Indeed, a completely different paragraph with a bold caption that states **"Exclusions from Agreement"** follows paragraph 2, which includes the Agreement's applicability. Thus, an employee reading paragraph 2 will immediately see the exclusions conspicuously set forth one paragraph below. This paragraph, like paragraph 2, are located in the top portion of the first page of the Agreement. Thus, the employee need not even flip the page to find exclusions from the Agreement – they are readily available for the employee to review on the very same page. The exclusionary language also explicitly explains that charges under the "National Labor Relations Board" and "NLRB" are excluded. Thus, an employee unaware of the NLRB's acronym or complete agency name is provided with both. Therefore, there is no ambiguity. *See also ISS Facility Services, Inc.*, 363 NLRB No. 160 (Apr. 7, 2016) (Miscimarra criticized the majority for "selectively" focusing on the language that broadly stated that the agreement applied to "any claims," while ignoring the language that explicitly allows for the filing of charges); *Applebee's Rest.*, 363 NLRB No. 75, slip op. at 2-5 (2015) (Member Miscimarra, dissenting in part).

Kelly recognizes the ALJ's adoption of the Board majority's illogical readings employed

to find violations in cases with similar contractual provisions. However, Kelly contends that this case presents the perfect opportunity for the Board to reverse course, and in place of "false, circular premise[s] and tortured interpretations," employ reasonableness and a plain reading of the actual text of the Agreement, as has been previously advocated by Chairman Miscimarra. Under a reasonable, plain reading of paragraph 3 of the Agreement, no violation of the Act can be sustained.

C. The ALJ Disregarded The Actual Stipulated Issue

1. Backpay Is Not A Board Process — It Is A Remedy

In finding a violation of the Act, the ALJ ignored the stipulated issue and instead, focused on whether or not the Agreement interfered with the filing of charges. In the decision, the ALJ notes that he cannot "understand" the distinction Respondent made with respect to the applicability of the Agreement to those cases in which backpay would be available and those in which it would not. (ALJD at 5). To be clear, this is not a distinction that Respondent has made – it is a distinction that the GC made by contending that the issue in this case is whether the agreement "interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings." (Stipulation at 3) (emphasis added). As set forth in the parties' stipulation here, this is *not* a case in which the allegation is that the Agreement precludes the filing of charges – as has been the issue litigated in front of the Board in other cases. *See, e.g.*, *Applebee's Rest.*, 363 NLRB No. 75, slip op. at 2-5 (2015); *Solarcity Corp.*, 363 NLRB No. 83 (2015); *Ralph's Grocery*, 363 NLRB No. 128 (2016). Here, the GC explicitly alleged that the agreement interferes with the Board's processes by precluding employees from receiving backpay or other monetary compensation.

There is no statutory support or case law precedent for the arbitrary distinction drawn by the GC, and subsequently left unaddressed by the ALJ. If the GC's position were to be accepted, the very same agreement could be found lawful where no backpay could be or was awarded, whereas the agreement would be found unlawful if the charging party was able to obtain monetary remedies. This would be the result even though the charging party signed the same agreement and proceeded through the Board's processes identically. In fact, in this case, the remedy sought by the Board is "an Order requiring that Respondent rescind the provisions of its Arbitration Agreement set forth in paragraph 3(a) and notify all employees employed by Respondent of the rescission." (J-Ex. 3 at 3). Thus, based on the GC's position, because no backpay is sought by a charging party, the agreement, as applied here, is lawful. This arbitrary distinction is unfounded.

The GC misguidedly contends that employees are restricted in their "access to Board processes" by "prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings." (J-Ex. 3). The GC's position is baseless because nothing in the Agreement restricts employees from filing charges, participating in the investigation of the charges, including by providing documentary evidence, providing affidavits, and making witnesses available to the Regional offices, testifying at hearings, or assisting their coworkers with their unfair labor practice charges. These are the Board's processes.

Backpay, on the other hand, is a *remedy*, not a Board process. Indeed, backpay is not guaranteed, and in most cases backpay is not awarded, unless, for example, backpay is calculated to be owed, such as when the Board finds that an employee was unlawfully terminated. *NLRB Case Handling Manual*, Part 1, Unfair Labor Practice Proceedings, § 10130.2 (February 2017).

The Board's other remedies include, among other things, notice postings, notice readings, and requiring unions and employers to bargain. *Id.* §§ 10131.1; 10131.6; 10132.

Moreover, under the NLRB's processes, the charging party is not guaranteed any process or any remedy. The NLRB retains the right to prosecute the case and settle the case as the Region sees fit. *See, e.g., id.* § 10122 ("Following a determination not to issue complaint and absent withdrawal of the charge by the charging party, the Regional Director will . . . dismiss the charge . . ."); *id.* §10140.3 ("In cases involving individuals not represented by a union or an attorney, the Board agent should make known to the charging party the *Regional Office's willingness* to participate in any settlement discussions and its availability for consultations as to the requirements of a Board settlement . . .") (Emphasis added). Accordingly, having *access* to the Board's processes has nothing to do with obtaining a specific remedy; no specific remedy is guaranteed.

2. All Authority And The NLRB's Practices Support A Finding That Obtaining Redress To Employees' Statutory Claims Outside Of The Board's Processes Is Lawful And Encouraged

Finally, Supreme Court authority, the Act, Board precedent and the Board's practices support Respondent's position that this allegation has no merit and must be dismissed because seeking redress outside of the Board's processes does not equate with being restrained in participating in the Board's processes.

The Supreme Court has long held that claims arising out of statute can be lawfully resolved through arbitration. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). As the Supreme Court articulated:

> The decision to resolve [statutory] claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace . . . discrimination; it waives only the right to seek relief from a court in the first instance. . . . This court has been quite specific in holding that

> arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law.

Id. 266 (citation and internal quotation marks omitted). In *14 Penn Plaza*, the Supreme Court held that a collective bargaining agreement between a union and an employer could lawfully provide for the arbitration of claims arising out of a statute. *Id.* at 258 ("having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue") (citing *Gilmer*, 500 U.S. at 26). However, the Supreme Court carefully noted that: "**[n]othing in the law suggest a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative**." *Id.* at 258 (emphasis added). Therefore, the Supreme Court has made clear that individuals can enter into contracts through which they can agree to arbitrate statutory claims and obtain any warranted monetary relief through arbitration. Hence, it does not follow that an employer would violate the Act by entering into the very agreements the Supreme Court has ruled parties can enter into to redress their statutory claims.

Despite Supreme Court precedent, the ALJ states that the NLRB's deferral to arbitration has been limited to cases in which a collective bargaining agreement calls for arbitration and thus, that Respondent's argument here has no merit. (ALJD at 6). The ALJ's decision ignores the Supreme Court precedent. By doing so, the ALJ unexplainably takes the position that the NLRB's position on this issue trumps Supreme Court authority. It obviously does not. *See, e.g.*, *Hoffman Plastic*, 535 U.S. 137, 148 (2002).

Moreover, the NLRA's statutory language also supports finding that this allegation must be dismissed. More specifically, Section 10(a) shows that Congress favored the parties entering

into agreements to adjust or resolve their statutory claims by means other than through the Board's processes. Section 10(a) states:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

29 U.S.C. § 160(a) (emphasis added). Therefore, "Section 10(a) of the Act guarantees that the Board always has authority to address and resolve unfair labor practice charges, *even though a private agreement may provide for the adjustment or resolution of these claims in arbitration.*" *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 5 (2016) (Miscimarra, P., dissenting) (emphasis added). As set forth above, Section 9(a) of the Act also gives employees the right as "individual[s]" to "present" and "adjust" grievances "at any time." 29 U.S.C. § 159(a). Thus, the Act provides for the adjudication of statutory claims outside of the Board's processes.

Board precedent also supports finding that no violation exists in the instant case. The Board has historically had a practice of deferring to arbitration. *See, e.g.*, *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) (setting forth the Board's standard on post-arbitration deferral); *Collyer Insulated Wire*, 192 NLRB 837 (1971) (setting forth the Board's standard on pre-arbitration deferral). Indeed, recently, in *Babcock & Wilcox Construction*, even changing its standard for doing so, the Board continued its policy of deferring cases to arbitration. 361 NLRB No. 132 (Dec. 15, 2014). Although the Board's precedent has focused on the arbitration of claims through a grievance and arbitration process set forth in a collective bargaining agreements, as set forth above, the Supreme Court has noted that no distinction exists between these agreements to arbitrate via a collective bargaining agreement and those agreements entered into by individuals. *14 Penn Plaza LLC*, 556 U.S. at 258. Indeed, Chairman

Miscimarra has recently addressed the applicability of the Board's holding in *Babcock & Wilcox* to cases in which the agreements are entered by individuals, rather than by unions:

> As I explained in *Ralph's Grocery*, *GameStop Corp.*, and *Applebee's Restaurant*, decades of case law--including the Board's recent decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014)--establish that parties may lawfully agree to submit NLRA claims to arbitration, provided that the agreement does not otherwise interfere with NLRB charge filing. Such an agreement does not unlawfully prohibit the filing of charges with the NLRB, particularly when the right to do so is expressly stated in the agreement itself. In this case, the Agreement expressly provides that "claims may be brought before an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims may include without limitation claims or charges brought before . . . the National Labor Relations Board."

Adecco USA, Inc., 364 NLRB No. 9, slip op. at 9 (May 24, 2016) (Miscimarra, P., dissenting); *see also Ralph's Grocery Co.*, 363 NLRB No. 128 (2016) ("Indeed, the Board's decision in *Babcock & Wilcox Construction* leaves no doubt that NLRA claims can be made subject to a mandatory arbitration award. The Board majority in *Babcock* stated that, as a prerequisite to affording deference to any resulting arbitration award, the Board would require the parties to have explicitly authorized the arbitrator to decide the *unfair labor practice issue*.") (emphasis in original) (quotation marks omitted). Given that the Board defers to arbitration awards and that the Supreme Court has found no distinction between parties deferring their statutory claims to arbitration pursuant to a collective bargaining agreement or as individuals entering into their own contracts, this precludes a finding that Kelly's agreement is unlawful.

Finally, the NLRB's procedures do not establish any basis for finding that the adjudication of statutory claims via arbitration somehow violates the Act. Regional offices allow charging parties to withdraw their charges for various reasons, including in response to the parties reaching a non-Board settlement. *NLRB Case Handling Manual*, Part 1, Unfair Labor Practice Proceedings, § 10140 (February 2017) ("In addition to Board settlements, unfair labor

practice charges may be resolved through *a specific agreement between the parties*, including grievance settlements, or as a result of unilateral action taken by the charged party which satisfies the charging party. Non-Board adjustments result in the withdrawal of the charge or, in limited circumstances, dismissal.") This shows again that the NLRB has a practice of allowing charging parties to settle their disputes outside of the Board's processes. *Id.* § 10124 ("Unfair labor practice cases may be resolved through informal or formal Board settlement agreements or through non-Board adjustments;") *Id.* § 10124.1 ("It is the policy of the Board and the General Counsel to actively encourage the parties to reach a mutually satisfactory resolution of issues at the earliest possible stage."). Given that the NLRB's Case Handling Manual allows individuals to settle their own statutory claims, even after filing charges, it doesn't follow that employees cannot arbitrate their statutory claims and seek economic relief through arbitration. If such was the case, the Case Handling Manual sections concerning withdrawals and non-Board settlements would also run afoul of the Act.

Moreover, backpay awards under the NLRB's processes are also subject to negotiation. Thus, there is no meaningful difference between proceeding through the NLRB's processes or obtaining a resolution outside of the Board's processes – both are subject to negotiation by the parties:

> The backpay calculations should be made consistent with Agency policy and methods as set forth in Compliance Manual and relevant General Counsel memoranda. For guidance, including clearance from the Division of Operations-Management, concerning backpay settlements amounting to less than 80 percent of net backpay, see Sec. 11752 and Secs. 10592.1, .4 and .8 of the Compliance Manual.

Id. § 10130.2. The Case Handling Manual makes clear that the NLRB can accept backpay settlements that are under 80 percent of the calculated backpay amount. *Id.* There is no guarantee that a charging party will obtain 100% of the calculated backpay amount by

proceeding through the Board's processes. In fact, Administrative Law Judge Steven Fish noted how arbitrary and inconsistent the Board's backpay settlements really are:

> [T]he Board and/or judges have frequently approved settlements, which did not meet the 80% figure. Indeed, in *Independent Stave*, itself, the Board approved a settlement, which included backpay of only 10% of the amount due, although the agreement did include reinstatement for three discriminatees. See also *American Pacific Concrete Pipe Co.*, 290 NLRB 623, 623-624 (1988) (in a backpay hearing, where unlike the instant case, liability had already been determined, Board approves settlement over the objection of General Counsel of backpay of slightly under 50%; payment of $20,000, where the backpay specification claimed that discriminatee was owed $41,610); *Service Merchandise Co.*, 299 NLRB 1132, 1134 (1990) (one of the discriminates waived reinstatement and accepted 50% of backpay); *Combustion Engineering*, supra, 272 NLRB at 217 (Board approves settlement agreement reached between union and employer settling grievances, which encompassed complaint violations, providing for no backpay but with reinstatement); *Central Cartage Co.*, 206 NLRB 337, 337-338 (1973) (Board approves settlement negotiated between the union and employer, which provided for no backpay for alleged discriminatee and included agreement as to what work alleged discriminatee would perform); *Roselle Shoe Corp.*, 135 NLRB 472, 475-478 (1962) (Board approves settlement over objection of charging party, where backpay agreed upon was $12,000 for each discriminatee although if charging party's computation is accepted there would be $80,000 due for each discriminatee); *Insulation Sales Inc.*, 1998 WL 1985159 (NLRB Division of Judges 1998) (judge approved settlement between employer and charging party/discriminatee, providing for backpay of approximately one-third of what would have be due and waiver of reinstatement; General Counsel, although objecting to approval of withdrawal request, did not appeal judge's decision); *Ribbon Sumyoo Corp.*, 1992 WL 1465636 (NLRB Division of Judges 1992) (judge approves non-Board settlement providing for approximately 45% of backpay, plus waiver of reinstatement, over objection of General Counsel; again, no appeal filed by General Counsel to judge's approval of agreement and granting motion to withdraw charges).

Gormet Toast Corp., Case No. 29-CA-30404, 2011 WL 2433351, at *7 (June 16, 2011).

Accordingly, the GC's position that paragraph 3 of the Agreement restrains employees from participating in the Board's processes is unsupported by Supreme Court authority, the statutory language of the NLRA, and the Board's processes and practices. There is simply no basis for finding that the Agreement interferes with a party's access to the NLRB's processes.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the Complaint should be dismissed in its entirety.

Respectfully submitted,

KELLY SERVICES, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of this brief to be served upon the Board and the Region via electronic filing and the following counsel of record in the manner listed below on this 20th day of June, 2017:

Marielle Macher, Esq. (via FedEx)
Counsel for the Charging Party
Community Justice Project
118 Locust Street
Harrisburg, PA 17101-1414

/s/ 

EXHIBIT A

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

April 21, 2017

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Epic Systems Corp. v. Lewis, No. 16-285
Ernst & Young LLP, et al. v. Morris, et al., No. 16-300
National Labor Relations Board v. Murphy Oil USA, Inc., et al., No. 16-307

Dear Mr. Harris:

Pursuant to Rules 25 and 30 of the Rules of this Court, the Acting Solicitor General respectfully requests that the briefing schedule in these consolidated cases be extended such that opening briefs will be due on June 9, 2017, and response briefs will be due on September 15, 2017.

1. At issue in these cases are arbitration agreements between individual employees and their employers that bar the employees from pursuing work-related claims on a collective or class basis. The question presented is whether such agreements limit the employees' right under the National Labor Relations Act (NLRA) to engage in "concerted activities," 29 U.S.C. 157, and whether the agreements are enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. 2. The National Labor Relations Board (Board) has held that employers who require their employees to sign such agreements have engaged in an unfair labor practice in violation of the NLRA, 29 U.S.C. 158. See D.R. Horton, Inc., 357 N.L.R.B. 2277, 2277-2283 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013). The Board also has held that when such an agreement violates the NLRA, the FAA does not require its enforcement. See id. at 2277, 2283-2288.

The courts of appeals have divided over the correctness of the Board's position. The two courts of appeals to adopt the Board's position have done so based in part on deference to the Board. See Morris v. Ernst & Young, LLP, 834 F.3d 975, 980-981 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1153 (7th Cir. 2016). The Board, however, currently has two vacant seats, and the three remaining members of the Board are divided 2-1 on the question at issue in these cases. Compare Pet. App. 17a-88a (No. 16-307) (majority opinion), with id. at 89a-131a (Member Miscimarra, dissenting). Appointment by the President of two additional

members therefore could affect the Board's position on the question presented, which in turn could affect the Court's disposition of these cases.

2. In light of the division of authority in the courts of appeals, this Court granted petitions for writs of certiorari in three cases, including a petition filed by this Office on behalf of the Board (No. 16-307). The cases have been consolidated, and the Court has ordered petitioners in Nos. 16-285 and 16-300 and respondents in No. 16-307 (the employers in these cases) to file opening and reply briefs; it has ordered respondents in Nos. 16-285 and 16-300 (the employees) and petitioner in No. 16-307 (the Board) to file response briefs.

In February 2017, the parties agreed to a proposed extension to the briefing schedule, which the Clerk approved. Under that schedule, opening briefs are now due April 28, 2017, and response briefs are now due July 27, 2017.

3. In light of recent developments, the current briefing schedule is no longer adequate for the government. The Acting Solicitor General is engaged in a process of reviewing the position of the United States in these cases. Based on a request of counsel for the petitioners in Nos. 16-285 and 16-300 to meet concerning these cases, the Acting Solicitor General has met with the parties and consulted with the Board and other components of government. To complete the process of determining the position of the United States, the Acting Solicitor General must fully assess the legal issues that these cases present and consult with new leadership within the government.

The government has asked the other parties to agree on a further extension to the briefing schedule under which opening briefs would be due in early June and response briefs would be due in mid-September. All of the parties that have been ordered to file opening briefs agreed. The parties (other than the government itself) that were ordered to file response briefs agreed to an extension of approximately two additional weeks for each side, under which opening briefs would be due on May 12, 2017, and response briefs would be due on August 4, 2017. The response-side parties in Nos. 16-285 and 16-300, however, have opposed any extension beyond those dates.

4. The government respectfully submits that a May 12 deadline for opening briefs would provide insufficient time for the Acting Solicitor General to complete internal consultation and, if found appropriate, to prepare a brief supporting the position in the opening briefs. Given the complexity of the issues involved in these cases, the interplay between two important federal statutes that implicate different interests, and the change in leadership in the government, additional time is necessary to ensure that the Acting Solicitor General can provide the Court with the considered views of the government. Extension of the briefing schedule also could be beneficial for the Court's consideration of and decision in these cases. Because the two courts of appeals that have upheld the Board's current position have relied in part on principles of administrative deference, a change in the government's position could affect the framework for analysis of the issues presented to the Court for decision.

The government therefore respectfully requests that the briefing schedule be extended such that opening briefs will be due on June 9, 2017, and response briefs will be due on

September 15, 2017. This briefing schedule would still permit these cases to be set for argument during one of the Court's Fall 2017 sittings. If counsel have conflicts with oral argument dates for the Court's November sitting, it would be appropriate for the Court to set the cases for argument in December. In the alternative, the Acting Solicitor General requests an extension such that opening briefs will be due on May 12, 2017, and response briefs will be due on August 4, 2017.

Sincerely,

Jeffrey B. Wall
Acting Solicitor General

cc: See Attached Service List

EXHIBIT B

Nos. 16-285, 16-300, and 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, PETITIONER

v.

JACOB LEWIS

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH, SEVENTH, AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300 AND SUPPORTING RESPONDENTS IN NO. 16-307

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QUESTION PRESENTED

Whether arbitration agreements that bar individual employees from pursuing work-related claims on a collective or class basis limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and whether such agreements are enforceable under the Federal Arbitration Act, 9 U.S.C. 2.

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In the Supreme Court of the United States

No. 16-285

EPIC SYSTEMS CORPORATION, PETITIONER

v.

JACOB LEWIS

No. 16-300

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

No. 16-307

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH, SEVENTH, AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300 AND SUPPORTING RESPONDENTS IN NO. 16-307

INTEREST OF THE UNITED STATES

These cases present the question whether arbitration agreements that bar individual employees from pursuing work-related claims on a collective or class basis impermissibly limit the employees' right under the National Labor Relations Act (NLRA) to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, or whether such agreements instead are enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. 2. The United States and the National Labor Relations Board (NLRB or Board) have responsibility for enforcing the NLRA, and the NLRB filed a petition for a writ of certiorari in No. 16-307.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. In 1925, Congress enacted the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, to "overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). The FAA provides that any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. If a suit is brought concerning "any issue referable to arbitration under an agreement in writing for such arbitration,

the court in which such suit is pending" must, "on application of one of the parties," stay the proceedings and refer the matter to arbitration in accordance with the parties' agreement. 9 U.S.C. 3.

2. The National Labor Relations Act, 29 U.S.C. 151 *et seq.*, was enacted in 1935 to encourage collective bargaining and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. 151. The NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. An employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" has committed "an unfair labor practice." 29 U.S.C. 158(a)(1). The National Labor Relations Board "is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a).

In January 2012, the Board ruled that agreements between individual employees and their employers that require arbitration of work-related disputes on a bilateral (rather than collective or classwide) basis interfere with the employees' right under Section 157 to engage in concerted activities, in violation of Section 158(a)(1). *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2278-2283. The Board determined that, "[j]ust as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section [157], the prohibition of individual agreements

imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section [158]." *Id.* at 2281.

The Board also expressed the view that its ruling did not conflict with the FAA. The Board stated that its rationale was not specific to arbitration, and that the contractual term at issue "would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the [employer] solely on an individual basis." *D.R. Horton*, 357 N.L.R.B. at 2285. The Board also noted that, under the FAA's saving clause, see 9 U.S.C. 2 (requiring enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract"), arbitration agreements "remain subject to the same defenses against enforcement to which other contracts are subject." 357 N.L.R.B. at 2284.

On review, the Fifth Circuit rejected the Board's analysis. *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 360-362 (2013). The court held that enforcement of the challenged arbitration agreement would not "deny a party any statutory right" because "use of class action procedures * * * is not a substantive right" under Section 157. *Id.* at 357.[1] Judge Graves dissented in relevant part, explaining that he agreed with the Board's reasoning. *Id.* at 364-365.

3. These consolidated cases involve agreements, signed by individual employees and their employers, in

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[1] The Fifth Circuit in *D.R. Horton* agreed with the Board that an arbitration agreement constitutes an unfair labor practice to the extent that it prohibits employees from filing unfair-labor-practice charges with the Board. 737 F.3d at 364.

which the parties have agreed to resolve work-related disputes through bilateral arbitration.

a. Epic Systems Corporation makes healthcare software. 16-285 (*Epic*) Pet. App. 1a. In April 2014, it sent an email to its employees requiring them, as a condition of employment, to agree to arbitrate all wage-and-hour claims. The agreement specified that the employees waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Id.* at 2a (emphasis omitted).

Jacob Lewis, an employee who had consented to the arbitration agreement, filed a federal-court suit against Epic Systems "individually and on behalf of all others similarly situated." *Epic* Pet. App. 2a, 24a. Lewis alleged that Epic Systems had violated the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and state law by denying overtime pay to him and other employees. When Epic Systems moved to dismiss the suit and to compel bilateral arbitration, Lewis argued that the arbitration agreement was invalid and unenforceable under the NLRA. *Epic* Pet. App. 2a-3a. The district court agreed with Lewis and denied Epic Systems' motion. *Id.* at 24a-29a.

The Seventh Circuit affirmed. *Epic* Pet. App. 1a-23a. The court concluded that the "text, history, and purpose" of Section 157 show that it "should be read broadly to include resort to representative, joint, collective, or class legal remedies." *Id.* at 5a-6a. The court also stated that, even if Section 157 were ambiguous, the court would defer to the Board's determination that the NLRA "prohibit[s] employers from making agreements with individual employees barring access to class or collective remedies." *Id.* at 7a (citing *D.R. Horton*). The court rejected Epic Systems' contention that the FAA

required enforcement of the agreement. *Id.* at 12a-23a. The court concluded that, because Epic Systems' concerted-action waiver is prohibited by the NLRA, and because illegality is a "ground[] * * * for the revocation of any contract" within the meaning of the FAA's saving clause, 9 U.S.C. 2, the waiver is unenforceable under the FAA's own terms. *Epic* Pet. App. 12a-15a.

b. Ernst & Young LLP and its U.S.-based affiliate (collectively, Ernst & Young) provide accounting services. 16-300 (*E&Y*) Pet. App. 2a, 43a-44a. Ernst & Young required its employees, as a condition of employment, to sign a "concerted action waiver" in which they agreed to arbitrate any legal claims against the company and to do so "only as individuals and in separate proceedings." *Id.* at 2a (internal quotation marks omitted). Despite signing that agreement, two Ernst & Young employees filed suit in federal court, on behalf of themselves and others similarly situated, alleging that the company had improperly denied them overtime wages in violation of the FLSA and state law. *Ibid.* The district court granted Ernst & Young's motion to compel bilateral arbitration and dismissed the suit. *Id.* at 43a-67a.

The Ninth Circuit reversed. *E&Y* Pet. App. 1a-25a. The court held that the NLRA gives employees a "right to pursue work-related legal claims together," and that Ernst & Young had violated that right by requiring its employees to resolve their legal claims in separate arbitration proceedings. *Id.* at 3a; see *id.* at 3a-11a. The court held that the FAA "does not dictate a contrary result" because that statute requires only that arbitration contracts be placed "'on equal footing with all other contracts,'" and the collective-action waiver would contravene the NLRA even if it were not contained in an

arbitration agreement. *Id.* at 12a (quoting *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468 (2015)) (citation omitted); see *id.* at 12a-14a. The court also characterized the employees' right to seek redress collectively as a non-waivable "substantive federal right," thereby distinguishing it from other cases involving "procedural" rights that may be limited by agreement. *Id.* at 15a-16a; see *id.* at 14a-21a.

Judge Ikuta dissented. *E&Y* Pet. App. 25a-42a. She explained that, "[i]n determining whether the FAA's mandate requiring 'courts to enforce agreements to arbitrate according to their terms' has been overridden by a different federal statute, the Supreme Court requires a showing that such a federal statute includes an express 'contrary congressional command.'" *Id.* at 28a (quoting *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012)). Because the NLRA does not expressly prohibit the type of arbitration agreement that is at issue here, Judge Ikuta would have enforced the agreement as written. *Id.* at 34a-38a.

c. Murphy Oil USA, Inc. operates more than 1000 gas stations in 21 States. 16-307 (*Murphy Oil*) Pet. App. 24a. Murphy Oil required each of its employees and job applicants to sign a "Binding Arbitration Agreement and Waiver of Jury Trial" in which the parties waived their "right to commence, be a party to, or act as a class member in, any class or collective action" in any judicial or arbitration proceeding "relating to employment issues." *Id.* at 24a-25a (brackets omitted). In June 2010, four employees sued Murphy Oil in federal court, alleging FLSA violations. Invoking the arbitration agreement, Murphy Oil successfully moved to dismiss the collective action and to compel arbitration. *Id.* at 26a-28a.

One of the employees then filed an unfair-labor-practice charge with the Board, and the Board's General Counsel issued an administrative complaint against Murphy Oil. *Murphy Oil* Pet. App. 27a. In October 2014, the Board sustained the charge, reaffirming its prior decision in *D.R. Horton* and finding that Murphy Oil had violated the employee's right under the NLRA "to engage in collective action." *Id.* at 40a (quoting *D.R. Horton*, 357 N.L.R.B at 2286); see *id.* at 17a-89a. The Board stated that the NLRA creates "a substantive right to engage in concerted activity," and that the challenged arbitration agreement therefore "amounts to a prospective waiver of a right guaranteed by the NLRA." *Id.* at 43a. The Board also determined that its ruling did not conflict with the FAA because "the mandatory arbitration agreement is invalid under Section 2 of the FAA, the statute's savings clause," and because 29 U.S.C. 157 "amounts to a 'contrary congressional command' overriding the FAA." *Murphy Oil* Pet. App. 44a-46a (footnote omitted) (quoting *CompuCredit*, 565 U.S. at 98). Two members of the Board dissented in relevant part. See *id.* at 89a-131a (Member Miscimarra); *id.* at 131a-208a (Member Johnson).

Murphy Oil filed a petition for review, which the Fifth Circuit granted in relevant part. *Murphy Oil* Pet. App. 1a-16a. The court adhered to its precedent in *D.R. Horton*, holding that an employer may lawfully require its employees to agree to pursue all employment-related claims through bilateral arbitration, rather than through class or collective actions. *Id.* at 2a, 7a-8a & n.3.

SUMMARY OF ARGUMENT

Under the FAA, agreements to resolve disputes through arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Courts must enforce agreements to arbitrate federal claims unless the FAA's mandate has been overridden by a contrary congressional command or unless enforcing the parties' agreement would deprive the plaintiff of a substantive federal right. Neither of those justifications for non-enforcement is applicable here. The parties' agreements, including their prohibition on class-wide or collective proceedings, should therefore be enforced according to their terms.

A. The FAA's strong presumption in favor of enforcing arbitration agreements may yield where "Congress itself" has overridden that presumption in another statute. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted). In mandating enforcement of agreements to arbitrate a variety of federal statutory claims, the Court has made clear that statutory authorization to pursue class actions in court for violations of particular federal laws is insufficient to override the FAA's directive that agreements to arbitrate must be enforced.

Although the FLSA authorizes employees to pursue collective actions in court, that authorization is not meaningfully different from similar provisions of other laws that this Court has found insufficient to override the FAA's mandate to enforce arbitration agreements as written. Presumably for that reason, plaintiffs in these cases have not argued, and the courts of appeals that ruled in their favor did not suggest, that the FLSA—the statute under which plaintiffs' federal

claims arise—overrides the FAA's directive that their arbitration agreements should be enforced. Plaintiffs' argument thus depends on the proposition that the NLRA's recognition of a general right to engage in "concerted activities," 29 U.S.C. 157, confers greater rights to pursue FLSA claims collectively than does the FLSA itself.

In no other context, however, has Section 157 been construed to expand the availability of class or collective remedies beyond those that are authorized by the laws that directly address those issues. Section 157 would not, for example, allow employees who do not satisfy the numerosity and typicality requirements of Federal Rule of Civil Procedure 23 to pursue a class action against their employer. Similarly here, Section 157 does not supersede the balance struck in the FAA and FLSA, or expand the range of circumstances in which collective litigation can go forward.

Nothing in the NLRA's legislative history indicates that Congress intended to bar enforcement of arbitration agreements like those at issue here. The legislative record accompanying bills that became the NLRA mentioned arbitration only briefly, in stating that Congress had declined to impose mandatory arbitration or to make the Board an arbitration agency. And while the NLRB's reading of ambiguous NLRA language is entitled to judicial deference, the Board's analysis of the interplay between the NLRA and the FAA is not.

B. In mandating enforcement of pre-dispute agreements to arbitrate various federal statutory claims, this Court has often emphasized that an agreement to arbitrate does not entail any surrender of substantive statutory rights. Similarly here, the parties' arbitration

agreements do not purport to authorize employer conduct that would violate the FLSA's wage-and-hour provisions, and they do not prevent a successful plaintiff from recovering (through arbitration) the full relief that a court could award for an FLSA violation.

Nor does enforcement of the arbitration agreements deprive plaintiffs of any substantive right under the NLRA. Although Section 157 unquestionably confers important substantive rights to organize and to engage in collective bargaining, the arbitration agreements do not constrain plaintiffs' exercise of those rights. Even assuming that the right to utilize collective dispute-resolution mechanisms for FLSA claims is encompassed within Section 157's residual phrase ("other concerted activities"), there is no evident reason for viewing it as a substantive NLRA right, when it is clearly a procedural right under the FLSA itself.

This Court's decisions in *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), do not support a different conclusion. In those cases, the Court invalidated agreements between employers and their employees to resolve work-related disputes on a bilateral basis. But it did so because the employers had used the agreements as a basis for refusing to engage in collective bargaining. The agreements at issue here do not have any analogous anti-union purpose.

C. The FAA's saving clause provides no sound basis for declining to enforce the parties' arbitration agreements. The FAA's strong policy in favor of enforcing arbitration agreements applies equally to the parties' right to "specify *with whom* they choose to arbitrate their disputes." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). The Seventh and

Ninth Circuits understood the NLRA to prohibit enforcement of agreements to arbitrate work-related disputes bilaterally. The courts found that to be the sort of arbitration-neutral rule that the saving clause preserves because the rule focuses on the requirement of *bilateral* arbitration, rather than on the agreement to arbitrate as such.

This Court's decisions make clear, however, that the saving clause does not preserve rules of contract enforceability that would impede the achievement of the FAA's objectives, even when those rules are capable of application to contracts other than arbitration agreements. The Court in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), applied that principle to hold that a state-law rule against enforcement of class-action waivers contained in certain consumer contracts fell outside the saving clause. For substantially the same reasons, the saving clause does not encompass the analogous federal-law rule that the Seventh and Ninth Circuits derived from the FAA.

ARGUMENT

WHEN PARTIES AGREE TO ARBITRATE EMPLOYMENT-RELATED CLAIMS BILATERALLY, THE FAA REQUIRES ENFORCEMENT OF THOSE AGREEMENTS

The FAA establishes a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), the "central" feature of which is a directive that "private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted). When contracting parties have agreed to resolve federal claims through bilateral arbitration, that choice must be honored "unless the

FAA's mandate has been overridden by a contrary congressional command." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (*Italian Colors*) (citations and internal quotation marks omitted).

Under that approach, the agreements at issue here must be enforced. Although plaintiffs in these cases assert causes of action under the FLSA (as well as under state law), they do not contend that the FLSA itself precludes enforcement of their agreements to arbitrate those statutory claims. And neither the text nor the history of the NLRA suggests that it gives plaintiffs greater rights to pursue collective litigation than they can assert under other sources of law like the FLSA. Enforcement of plaintiffs' arbitration agreements would not deprive them of their substantive right under the FLSA to proper wage-and-hour compensation, or any procedural right under the NLRA to invoke whatever class or collective procedures are otherwise available to them.

In *Murphy Oil*, this Office previously filed a petition for a writ of certiorari on behalf of the NLRB, defending the Board's view that agreements of the sort at issue here are unenforceable. After the change in administration, the Office reconsidered the issue and has reached the opposite conclusion. Although the Board's interpretation of ambiguous NLRA language is ordinarily entitled to judicial deference, courts do not defer to the Board's conclusion as to the interplay between the NLRA and other federal statutes. We do not believe that the Board in its prior unfair-labor-practice proceedings, or the government's certiorari petition in *Murphy Oil*, gave adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the FAA.

More specifically, the Board's view that the phrase "other concerted activities" in 29 U.S.C. 157 encompasses participation in collective or class litigation may reflect a permissible interpretation of that language, such that an employer might commit an unfair labor practice by discharging employees who initiated or joined such suits in accordance with other provisions of law. It does not follow, however, that Section 157 *expands* the range of circumstances in which such litigation can go forward, by allowing employees who validly waived their collective-litigation rights under the FLSA to escape the consequences of that choice. The Board's approach fails to respect the FAA's directive that arbitration agreements should be enforced unless they run afoul of arbitration-neutral rules of contract validity.

A. The NLRA Does Not Preclude Enforcement Of An Agreement To Arbitrate Employees' Work-Related Claims Bilaterally

The FAA "reflects the overarching principle that arbitration is a matter of contract." *Italian Colors*, 133 S. Ct. at 2309. When parties agree in writing to resolve disputes through arbitration, the agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The FAA requires courts to "rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (brackets, citations, and internal quotation marks omitted). To be sure, "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command." *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220,

226 (1987). But a party resisting enforcement of an arbitration agreement bears the "burden" of showing "that Congress intended to preclude" enforcement. *Id.* at 227.

1. Bilateral arbitration agreements should be enforced absent a specific congressional command to the contrary

a. Although the policy in favor of arbitration applies to both federal- and state-law claims, see, *e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), this Court was initially reluctant to enforce agreements to arbitrate disputes that involved federal statutory rights. In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Court considered whether to enforce the parties' agreement to arbitrate a claim under the Securities Act of 1933. The Court observed that the Securities Act contained provisions "conferring jurisdiction" on federal district courts, *id.* at 433 & n.16 (citing 15 U.S.C. 77v(a) (1952)), and declaring "'void'" any agreement "'to waive compliance with any provision' of the Securities Act," *id.* at 430 (quoting 15 U.S.C. 77n). Based on those provisions, and on its skepticism of arbitration and arbitrators, see *id.* at 435-436, the Court determined that "the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness," *id.* at 437. The Court thus held that "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act." *Id.* at 438.

The *Wilko* Court's skepticism of arbitration, and its approach to reconciling the FAA with other federal statutes, were short-lived. In *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court held that the FAA

required enforcement of an agreement to arbitrate a dispute under the Securities Exchange Act of 1934, despite a statutory provision giving federal district courts "exclusive jurisdiction" over such suits. *Id.* at 514 (quoting 15 U.S.C. 78aa (1970)); see *id.* at 513-521. In *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court explicitly acknowledged that the balance it had previously struck in reconciling the FAA with other federal statutes had been colored by an inappropriate hostility toward arbitration. *Id.* at 626-628. And in *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), the Court overruled *Wilko*, a step the Court described as necessary "to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy." *Id.* at 484.

b. In more recent decisions addressing the enforceability of agreements to arbitrate federal statutory claims, the Court has asked whether "Congress itself," in enacting the statute that created the plaintiff's cause of action, "evinced an intention to preclude" enforcement of the parties' agreement. *Gilmer*, 500 U.S. at 26 (citation omitted). "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Ibid.* (quoting *McMahon*, 482 U.S. at 227). The Court has further explained that "the burden" rests with the party resisting enforcement of the arbitration agreement "to show that Congress intended" that result. *Ibid.* In each of those cases, after examining relevant text, history, and purpose, the Court concluded that Congress did not speak with the necessary specificity. See, *e.g.*, *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 89-92

(2000) (Truth in Lending Act); *Gilmer*, 500 U.S. at 26-33 (Age Discrimination in Employment Act of 1967); *Rodriguez de Quijas*, 490 U.S. at 479-484 (Securities Act of 1933); *McMahon*, 482 U.S. at 227-242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, 473 U.S. at 628-629 (Sherman Act).

CompuCredit Corp. v. *Greenwood*, 565 U.S. 95 (2012), is illustrative. There, individuals who had agreed to arbitrate their disputes with a credit-card company filed a class-action complaint in federal court under the Credit Repair Organizations Act (CROA), 15 U.S.C. 1679 *et seq.* See 565 U.S. at 96. When the defendants moved to compel arbitration under the FAA, the plaintiffs invoked various CROA provisions that required disclosure of a consumer's "right to sue" for statutory violations, *id.* at 99 (quoting 15 U.S.C. 1679c(a)); imposed liability for violations and "repeated[ly]" used "the terms 'action,' 'class action,' and 'court,'" *id.* at 100 (quoting 15 U.S.C. 1679g); and declared that "[a]ny waiver by any consumer of * * * any right of the consumer under" CROA would be "void" and unenforceable, *id.* at 99 (quoting 15 U.S.C. 1679f(a)).

The Court found those provisions insufficient to demonstrate that Congress intended to preclude enforcement of the plaintiffs' agreement to arbitrate their statutory claims. The disclosure provision (Section 1679c(a)) created no consumer right other than "the right to receive the [disclosure] statement" itself. *CompuCredit*, 565 U.S. at 99. The liability provision (Section 1679g) was merely a "guarantee of the legal power to *impose* liability," not a guarantee of access to any particular forum. *Id.* at 102 (emphasis omitted). And because neither of those provisions entitled a consumer to proceed in court, there

was no "right of the consumer" to which the non-waiver provision (Section 1679f(a)) might apply. *Id.* at 101-102 (citation omitted). The Court concluded that CROA was "silent on whether claims under the Act can proceed in an arbitral forum," and it accordingly held that "the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 104.

CompuCredit demonstrates the formidable burden a party bears when seeking to show that "the FAA's mandate has been 'overridden by a contrary congressional command.'" 565 U.S. at 98 (quoting *McMahon*, 482 U.S. at 226). One feature of *CompuCredit* and other decisions is especially notable for present purposes: When examining text and legislative history, the Court has looked for evidence that Congress intended to address arbitration agreements *in particular*. A statute's general reference to litigation rights, even when combined with a provision forbidding the waiver of statutory protections, is insufficient to overcome the FAA's presumption of enforceability. See, *e.g.*, *id.* at 99-102; *Rodriguez de Quijas*, 490 U.S. at 481-482; *McMahon*, 482 U.S. at 227-228.

2. The NLRA does not contain a specific congressional command precluding enforcement of plaintiffs' bilateral arbitration agreements

a. Plaintiffs in these cases have not argued, and neither the Seventh nor the Ninth Circuit suggested, that *the FLSA* precludes enforcement of the agreements at issue here. Although the FLSA authorizes suit "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," 29 U.S.C. 216(b), that provision is no different from other "utterly commonplace" provisions that "describe the details of * * * causes of action, including the relief

available, in the context of a court suit," *CompuCredit*, 565 U.S. at 100. "[M]ere formulation of the cause of action in this standard fashion" is not "sufficient to establish [a] 'contrary congressional command' overriding the FAA." *Id.* at 100-101 (quoting *McMahon*, 482 U.S. at 226); see *NLRB* v. *Alternative Entm't, Inc.*, No. 16-1385, 2017 WL 2297620, at *13 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part) ("Every circuit to consider the question has concluded that an employee may waive the right to bring a collective action under the [FLSA].").

Plaintiffs' argument thus depends on the premise that the NLRA imposes greater restrictions on the arbitrability of FLSA claims than does the FLSA itself. Nothing in the NLRA's text supports that proposition. Unlike many federal statutes, the NLRA does not specifically bar enforcement of agreements to arbitrate statutory claims or declare such agreements to be unlawful.[2] Plaintiffs therefore rely on general language in

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[2] See, *e.g.*, 7 U.S.C. 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); 10 U.S.C. 987(e)(3) ("It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which * * * the creditor requires the borrower to submit to arbitration."); 12 U.S.C. 5567(d)(2) ("[N]otwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."); 18 U.S.C. 1514A(e)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); see also, *e.g.*, 15 U.S.C. 1226(a)(2); 15 U.S.C. 1639c(e)(1); 22 U.S.C. 290k-11(a); 22 U.S.C. 1650a(a). In addition, Congress has delegated authority to preclude arbitration of certain statutory claims to agencies charged with administering the relevant statutes. See 12 U.S.C.

Section 157, which affirms the "Right of employees as to organization, collective bargaining, etc.," by providing as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

29 U.S.C. 157.

None of the specific rights enumerated in Section 157 involves the conduct of litigation. And even assuming that the residual phrase—"other concerted activities for the purpose of * * * mutual aid or protection"—encompasses the filing and prosecution of a collective or class suit asserting employment-related claims, see pp. 23-24, *infra*, that language clearly does not *focus* on litigation conduct. Any application that Section 157 may have to employees' litigation activities is much less direct and specific than the statutory language that was at issue in cases like *CompuCredit*, which the Court found insufficient to override the FAA. It is also much less direct and specific than the FLSA provision that authorizes employees to sue "for and in behalf of * * * themselves and other employees similarly situated." 29 U.S.C. 216(b). If that language (in the very statute

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5518(b) ("The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement * * * providing for arbitration of any future dispute between the parties."); 15 U.S.C. 78*o*(*o*) (authorizing the Securities and Exchange Commission to "prohibit, or impose conditions or limitations on the use of, agreements" to arbitrate disputes "arising under the Federal securities laws").

that creates plaintiffs' cause of action) is insufficient to bar enforcement of plaintiffs' agreement to bilateral arbitration of their FLSA claims, it would be anomalous to conclude that the NLRA's more general language has that effect. See *Alternative Entm't*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part).

Neither plaintiffs nor the courts of appeals that ruled in their favor have identified any *other* context in which Section 157 could give employees greater rights to pursue class or collective remedies in court than they would have under the laws that directly address those issues. An employee who sought certification of a plaintiff class, for example, could not invoke Section 157 as a basis for excusing non-compliance with Rule 23's numerosity and commonality requirements. See Fed. R. Civ. P. 23(a)(1) and (2). Rather than *expanding* the collective-litigation rights that employees possess, Section 157 at most provides employees additional protection when they exercise the collective-litigation rights that other laws confer. See pp. 23-25, *infra*. And in determining the scope of the collective-litigation rights that are otherwise available to plaintiffs in these cases, it is essential to take into account the FAA as well as the FLSA. Although the FLSA confers a right to sue, including in a collective action, plaintiffs waived that right by executing arbitration agreements that were valid under the terms of the FAA. Because plaintiffs had no right to pursue collective actions under the FLSA and FAA, any collective-litigation right that Section 157 may confer does not encompass their suits.

The NLRA further provides that an employer who "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" has

committed "an unfair labor practice." 29 U.S.C. 158(a)(1). But that provision simply protects the rights set forth in Section 157, which do not include any collective-litigation right beyond those conferred by other provisions of law. An employer would not commit an unfair labor practice by opposing certification of an employee class on the ground that Rule 23's requirements were not satisfied. By the same token, because Section 157 does not clearly displace the rule announced in the FAA, under which an employee's agreement to bilateral arbitration of workplace disputes is "valid, irrevocable, and enforceable," 9 U.S.C. 2, an employer does not "interfere with, restrain, or coerce employees in the exercise of the[ir] rights" by entering into or enforcing such an agreement, 29 U.S.C. 158(a)(1). Cf. *CompuCredit*, 565 U.S. at 101 ("But if a cause-of-action provision mentioning judicial enforcement does not create a right to initial judicial enforcement, the waiver of initial judicial enforcement is not the waiver of a 'right of the consumer,' § 1679f(a).").

b. The NLRA's legislative history does not suggest that Congress intended to preclude agreements to arbitrate bilaterally. Congress's primary goal in enacting the statute was to "promot[e] industrial peace by the recognition of the rights of employees to organize and bargain collectively." S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935) (Senate Report). Congress focused on "collective bargaining" in the traditional sense of the term—*i.e.*, "the right of employees to bargain collectively through representatives of their own choosing," *id.* at 12—and sought to remove known obstacles such as so-called "company unions," anti-union discrimination by employers, and employer interference with union elections. *Id.* at 9-14; see H.R. Rep. No. 1147, 74th Cong.,

1st Sess. 8-9 (1935). To the extent arbitration was discussed at all, it was only briefly, in making clear that Congress had declined to subject labor disputes to "any form of compulsory arbitration." Senate Report 2; see *id.* at 8 ("The committee does not believe that the Board should serve as an arbitration agency.").

c. Because the question is whether the NLRA contains a specific command from *Congress* precluding bilateral arbitration, the Board cannot supply the requisite clarity by gap-filling. The specific rights enumerated in Section 157 involve self-organization, association with labor unions, and collective bargaining. Plaintiffs' asserted right is very different from those, both because it concerns dispute resolution outside the workplace (whether in litigation or in arbitration) and because, unlike the enumerated Section 157 rights, it cannot plausibly be derived from the NLRA alone but depends on the FLSA's authorization of collective actions. Those differences cast doubt on whether the pursuit of an FLSA collective action is among the "other concerted activities for * * * mutual aid or protection" to which Section 157 refers. See *Murphy Oil* Pet. App. 100a-110a (Miscimarra, Member, dissenting in part); *id.* at 146a-156a (Johnson, Member, dissenting); *Alternative Entm't*, 2017 WL 2297620, at *15-*16 (Sutton, J., concurring in part and dissenting in part).

The Board's interpretation of ambiguous NLRA language is entitled to judicial deference, however, and its reading of Section 157's residual phrase may govern in contexts where the FAA does not apply. For example, an employer may commit an unfair labor practice under Section 158 if it discharges an employee for utilizing collective dispute-resolution mechanisms that are made available by other provisions of law (and that the

employee has not validly agreed to waive). Cf. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978) ("[I]t has been held [by the Board and lower courts] that the 'mutual aid or protection' clause [of Section 157] protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.").[3] Construing the NLRA to bar such retaliation would not implicate the FAA, and it would be unlikely to conflict with any other federal law.

But the Board is not entitled to deference when it determines how the NLRA should be harmonized with *other* federal statutes—here, the FAA. Cf. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002) (This Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the

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[3] Contrary to the Board's decision in *Murphy Oil*, see Pet. App. 18a, this statement from *Eastex* does not indicate that employees have an unwaivable right to pursue collective or class claims. The statement relates only to employees' right to be free from "retaliation," not their right to proceed collectively in litigation even if the employees have agreed to bilateral arbitration. The Court in *Eastex* expressly reserved "the question of what may constitute 'concerted' activities in th[e] context" of litigation, 437 U.S. at 566 n.15, because the particular activity at issue there was "distribut[ing] a union newsletter in nonworking areas of [the employer's] property during nonworking time urging employees to support the union," *id.* at 558. The Court in *Eastex* likewise did not address, and these cases do not present, the question whether an employee is protected from retaliation for invoking collective dispute-resolution mechanisms that he reasonably, but incorrectly, believes are legally available to him. Cf. *Alternative Entm't*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part) ("The employees' pursuit of collective procedures may or may not bear fruit, but the pursuit will nonetheless be protected from retaliation.").

NLRA."). As explained above, the question in these cases is not whether Section 157 provides additional protection for employees who invoke collective-action mechanisms that are available to them under other statutes or procedural rules. At the times they filed suit in these cases, plaintiffs had no FLSA rights to pursue collective actions because they had waived those rights through contracts that were "valid, irrevocable, and enforceable" under the terms of the FAA. 9 U.S.C. 2. The question in these cases is whether Section 157's residual language supersedes that FAA directive and thereby gives plaintiffs *greater* rights to pursue collective litigation than they could assert under the FLSA itself. The Board's determination that the NLRA trumps the FAA in that manner is not entitled to judicial deference.

B. Enforcing The Parties' Arbitration Agreements In These Cases, In Accordance With The FAA, Would Not Deprive Plaintiffs Of Any Substantive Right Conferred By Another Federal Statute

In holding that pre-dispute agreements to arbitrate federal statutory claims are enforceable, this Court has explained that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. The Court has contrasted that type of enforceable contract term with a hypothetical "provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Italian Colors*, 133 S. Ct. at 2310. In holding that the NLRA bars enforcement of the arbitration agreements at issue here, the Seventh and Ninth Circuits viewed those agreements as restricting "substantive" rather than

"procedural" rights. See *Epic* Pet. App. 17a; *E&Y* Pet. App. 14a. That analysis is misconceived.

1. Enforcement of the arbitration agreements at issue here would not deprive plaintiffs of any substantive right under the FLSA. Most obviously, the agreements do not purport to authorize the defendant-employers to engage in conduct inconsistent with the FLSA's wage-and-hour provisions. See 29 U.S.C. 206 (minimum wages); 29 U.S.C. 207 (maximum hours). Nor do the agreements prevent any employee who has suffered a statutory violation from obtaining (through arbitration) the full measure of relief that a court could award.

The Court's decisions also make clear that, for purposes of determining the enforceability of the arbitration agreements at issue here, the right to pursue a collective action under 29 U.S.C. 216(b) is a procedural rather than a substantive FLSA right. A "class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." *Italian Colors*, 133 S. Ct. at 2311. An agreement not to proceed collectively also does not undermine substantive FLSA rights, because collective dispute resolution "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (opinion of Scalia, J.).

2. Enforcement of the parties' arbitration agreements likewise would not deprive plaintiffs of any substantive right under the NLRA. To be sure, the rights enumerated in Section 157—*i.e.*, the rights "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of

their own choosing"—are core substantive rights conferred by the NLRA itself. Plaintiffs in these cases do not contend, however, and the courts below did not suggest, that the arbitration agreements at issue here impair plaintiffs' ability to self-organize, to form or associate with labor organizations, or to engage in collective bargaining.

Section 157's residual phrase confers on employees additional rights "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Although that residual language could be read to encompass only substantive workplace-related rights closely akin to self-organization or collective bargaining, the Board has construed it more broadly to cover litigation conduct. Assuming that is a permissible interpretation, it does not follow that the right to prosecute a collective action is a *substantive* NLRA right, simply because the enumerated rights are substantive in nature. Rather, if the Board's reading is permissible, it is because the residual phrase can reasonably be construed to cover procedural matters as well as substantive ones. There is no evident reason to treat the right to pursue collective FLSA litigation as "procedural" under the FLSA and yet "substantive" under the NLRA.

3. In reaching the contrary conclusion, the Board incorrectly relied on *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). See *Murphy Oil* Pet. App. 33a, 44a-45a, 67a.

In *National Licorice*, an employer whose employees had recently taken action in favor of a union responded by requiring all employees to sign contracts "relinquish[ing] the right to strike, [and] the right to demand a closed shop or signed agreement with any union."

309 U.S. at 355. This Court concluded that the contracts "by their terms * * * imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by" the NLRA. *Id.* at 360.

In *J.I. Case*, after an employee union was certified, the employer refused to bargain with the union, relying on individual contracts it had signed with its employees. 321 U.S. at 333-334. The Court held that the "[i]ndividual contracts * * * may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement." *Id.* at 337. The Court accordingly ordered the employer to stop using the individual contracts as a ground for declining to bargain collectively. *Id.* at 340-342.

National Licorice and *J.I. Case* did not establish any general rule that "employers may not condition employment on the waiver of employees' right to take collective action by seeking class certification or the equivalent." *Murphy Oil* Pet. App. 33a. Rather, both decisions were highly dependent on a key factual feature that is absent here. The agreements at issue in those cases "were the means adopted to eliminate the Union as the collective bargaining agency of [the] employees." *National Licorice*, 309 U.S. at 360 (internal quotation marks omitted); see *J.I. Case*, 321 U.S. at 337 (The employer "used [the agreements] to forestall bargaining or to limit or condition the terms of the collective agreement."); see also *Murphy Oil* Pet. App. 175a-178a (Johnson, Member, dissenting).

To be sure, the Court in *National Licorice* did say that "[t]he effect of [the anti-union] clause [in the employer-created contracts] was to discourage, if not forbid, any presentation of the discharged employee's grievances to appellant through a labor organization or his chosen representatives, or in any way except personally." 309 U.S. at 360. But as the sentence preceding that one makes clear, the Court's concern was that such an agreement would "forestall[] collective bargaining with respect to discharged employees." *Ibid.* The present cases do not implicate that concern. And the Court in *National Licorice* and *J.I. Case* did not confront a situation where another federal statute (like the FAA in the present cases) specifically condoned the employers' conduct.

C. The FAA's Saving Clause Provides No Sound Basis For Declining To Enforce The Parties' Arbitration Agreements

The Seventh and Ninth Circuits relied in part on the FAA's saving clause, 9 U.S.C. 2, which provides that written arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Those courts viewed "illegality" as one of the generally applicable grounds for contract revocation referenced in the saving clause. *Epic* Pet. App. 15a; *E&Y* Pet. App. 14a. They construed the NLRA to "prohibit employers from making agreements with individual employees barring access to class or collective remedies," *Epic* Pet. App. 7a; see *E&Y* Pet. App. 9a-11a, and concluded that such agreements are "illegal, and meet[] the criteria of the FAA's saving clause for nonenforcement." *Epic* Pet. App. 15a; see *E&Y* Pet. App. 14a, 16a-18a; see also *Murphy Oil* Pet. App. 44a. That analysis is incorrect.

1. The congressional policy judgment that the FAA reflects is not simply a preference for an arbitral rather than judicial forum. The FAA mandates enforcement of a "written provision in * * * a contract * * * to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. 2. In addition to memorializing the parties' agreement to arbitrate, the "written provision" that the FAA declares to be enforceable can and typically does describe the procedures by which the arbitration will be conducted. Indeed, a principal virtue of contracted-for arbitration is that it allows contracting parties to choose procedures tailored to their own circumstances. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344-345 (2011).

The FAA thus reflects Congress's belief in "the consensual nature of private dispute resolution," including the freedom of contracting parties "to structure their arbitration agreements as they see fit." *Stolt-Nielsen*, 559 U.S. at 683 (citation omitted). That freedom encompasses the right to "agree on rules under which any arbitration will proceed," including a right of contracting parties to "specify *with whom* they choose to arbitrate their disputes." *Ibid.*; see *Italian Colors*, 133 S. Ct. at 2309. Forcing parties to arbitrate collectively or on a classwide basis, when they have not "*agreed* to do so," is just as inconsistent with the FAA as requiring them to litigate when they have agreed to arbitrate. *Stolt-Nielsen*, 559 U.S. at 684; cf. *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 200-201 (1991) (noting "the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration").

2. The saving clause permits courts to "invalidate an arbitration agreement based on 'generally applicable

contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, No. 16-32 (May 15, 2017), slip op. 4 (quoting *Concepcion*, 563 U.S. at 339). The types of generally applicable rules of contract enforceability that the saving clause covers are at least predominantly, if not exclusively, the province of state law.[4] This Court has never applied the saving clause to a case in which another *federal* statute was alleged to render the parties' arbitration agreement unenforceable.

To be sure, the saving clause is not explicitly limited to state-law grounds for contract revocation, and in theory it would cover a (hypothetical) federal law that barred enforcement of contracts on a generally applicable ground like fraud. But the Seventh and Ninth Circuits' interpretation of the NLRA is not that type of arbitration-neutral rule. Those courts viewed their rule as being

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[4] State-law defenses were thus at issue in every case in which this Court has applied the saving clause—or, more commonly, declined to do so because the defense was found to discriminate against arbitration. See, *e.g.*, *Kindred Nursing Ctrs.*, slip op. 4-7 (invalidating defense under Kentucky law that discriminated against arbitration); *Preston* v. *Ferrer*, 552 U.S. 346, 354-356 (2008) (California law); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) (Montana law); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 269, 281-282 (1995) (Alabama law); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10, 16 & n.11 (1984) (California law). And in considering and rejecting various claims that other *federal* statutes precluded enforcement of arbitration agreements, the Court has never treated the FAA's saving clause as relevant to its inquiry. See, *e.g.*, *CompuCredit*, 565 U.S. at 99-104; *Randolph*, 531 U.S. at 89-92; *Gilmer*, 500 U.S. at 26-33; *Rodriguez de Quijas*, 490 U.S. at 479-484; *McMahon*, 482 U.S. at 227-242; *Mitsubishi Motors*, 473 U.S. at 628-629; see also pp. 16-17, *supra*.

arbitration-neutral because it focuses on the agreements' requirement of *bilateral* arbitration, rather than on the obligation to arbitrate as such. The Ninth Circuit stated that "[i]t would equally violate the NLRA for [an employer] to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in 'separate proceedings.'" *E&Y* Pet. App. 13a. The Seventh Circuit likewise described the purported flaw in the challenged agreement as its requirement of bilateral dispute-resolution procedures: "If Epic's provision had permitted collective arbitration, it would not have run afoul of Section [157]." *Epic* Pet. App. 17a.

This Court's decisions make clear, however, that the FAA's saving clause does not encompass every rule of contract enforceability that is *capable* of application to contracts other than arbitration agreements. See, *e.g.*, *Kindred Nursing Ctrs.*, slip op. 5-6; *Concepcion*, 563 U.S. at 341-342. The Court in *Concepcion* applied that principle in the specific context of a state-law rule against enforcement of class-action waivers contained in certain consumer contracts. See 563 U.S. at 340 (describing relevant state-law rule). The Court described the ways in which use of class procedures can be expected to subvert the advantages that ordinarily attend arbitration. See *id.* at 348-351. The Court explained that the FAA's saving clause should not be construed "to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" because "the act cannot be held to destroy itself." *Id.* at 343 (citations omitted). It concluded that the FAA preempted the state-law rule barring enforcement of class-action waivers because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of

arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

Principles of conflict preemption do not directly govern the interpretive question that is currently before the Court, which involves the proper harmonization of two *federal* statutes. But *Concepcion* underscores that the rule adopted by the Seventh and Ninth Circuits substantially disserves the FAA's purposes, even though that rule would not preclude enforcement of *all* agreements to arbitrate employee claims, and even though it would also preclude enforcement of hypothetical employee-employer contracts that mandated individual suits in court. As the dissenting judge in *Ernst & Young* explained, the rule those circuits found to be implicit in the NLRA "would disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere with fundamental attributes of arbitration.'" *E&Y* Pet. App. 40a (Ikuta, J., dissenting) (brackets omitted) (quoting *Concepcion*, 563 U.S. at 344). Just as the saving clause was held not to encompass the state-law rule at issue in *Concepcion*, it does not encompass the analogous federal-law rule that the Seventh and Ninth Circuits derived from the NLRA. See *ibid.* Congress remains free to adopt such a rule, of course, but it must clearly and specifically express its intent to override the FAA's general federal policy—which Congress did not do in the NLRA.

CONCLUSION

The judgments of the courts of appeals in Nos. 16-285 and 16-300 should be reversed, and the judgment of the court of appeals in No. 16-307 should be affirmed.

Respectfully submitted.

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APPENDIX

1. 9 U.S.C. 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

3. 29 U.S.C. 158 provides:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an

election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or reten-

tion of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of

such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consum-

ers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry

affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representa-

tive of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts,

by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on

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[1] So in original. Probably should be "unenforceable".

the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with

such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.

and **Case 04-CA-171036**

T JASON NOYE, an Individual

BRIEF OF CHARGING PARTY T JASON NOYE IN OPPOSITION TO RESPONDENT KELLY SERVICES, INC.'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Respondent's Exceptions are meritless and should be rejected. In accordance with the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) and *In Re D. R. Horton, Inc.*, 357 NLRB 2277 (2012), Administrative Law Judge ("ALJ") Robert A. Giannasi properly concluded that Respondent's arbitration agreement unlawfully restricts protected concerted activity in violation of Section 7 of the National Labor Relations Act ("NLRA") by purportedly precluding employees from participating in class or collective actions. Likewise, the ALJ was correct in concluding that Respondent's arbitration agreement interferes with Board processes in violation of Section 7 of the NLRA by, in part, disallowing employees from recovering monetary damages through Board charges. Accordingly, as the ALJ's decision was correctly decided on both issues, Respondent's Exceptions should be denied without delay.

II. FACTUAL AND PROCEDURAL BACKGROUND

Charging Party T Jason Noye filed a charge with the National Labor Relations Board ("NLRB") on March 4, 2016 and an amended charge on July 14, 2016, alleging that Respondent violated and continues to violate Section 8(a)(1) of the NLRA by maintaining an unlawful arbitration agreement. Stip. of Facts ("Stip.") at 2, 4, Ex. A. Specifically, Charging Party alleges that Respondent maintains an arbitration agreement that (1) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to purport to waive their right to maintain class or collective actions in all forums with respect to their wages, hours, and other terms and conditions of employment; and (2) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings. *Id.* at 4.

On December 28, 2016, the Regional Director issued a Complaint and Notice of Hearing.

See Compl.; Stip. at 2. On March 30, 2017, the NLRB's General Counsel, Charging Party, and Respondent agreed for this matter to be decided on a stipulated record. Stip. of Facts, Ex. A.

In the stipulation, Respondent concedes that since at least September 5, 2015, it has required all of its employees to enter into a Dispute Resolution and Mutual Agreement to Binding Arbitration (the "Arbitration Agreement"). Ex. 6 to Stip. The Arbitration Agreement states, in relevant part, the following:

> **2. Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)
>
> **3. Exclusions from Agreement.** The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

> **8. Waiver of Class and Collective Claims.** Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

Stip. at 2-3.

On May 23, 2017, the ALJ issued his decision, concluding that (1) "Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action," and (2) "Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that employees reasonably would believe bars or restricts their right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board." *Kelly Servs., Inc.*, 4-CA-171036, slip op. at 6 (May 23, 2017).

On June 20, 2017, Respondent filed Exceptions to the Decision of the ALJ. Charging Party now opposes Respondent's Exceptions.

III. ARGUMENT

First, Respondent is incorrect in demanding that the Board depart from its prior decisions in *Murphy Oil* and *D.R. Horton*, as the Board's past decisions are correct that arbitration agreements waiving class or collective remedies interfere with employees' right to engage in protected concerted activity. Likewise, Respondent is wrong in claiming that its arbitration

agreement, which precludes recovering monetary damages through Board charges, does not interfere with Board processes. Accordingly, Respondent's Exceptions should be denied without delay. A stay of this case is not appropriate.

A. The Board Correctly Concluded that Arbitration Agreements Waiving Class or Collective Remedies Interfere with Employees' Right to Engage in Protected Concerted Activity.

First, Respondent is incorrect in insisting that the Board depart from its holdings in *Murphy Oil* and *D. R. Horton*. As Respondent recognizes, the Board already concluded in both *Murphy Oil* and *D.R. Horton* that arbitration agreements that waive the right to participate in class or collective action litigation violate Section 8(a)(1) of the Act. *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 7; *In Re D. R. Horton, Inc.*, 357 NLRB at 2281. The Board reasoned that Section 7 of the NLRA protects the right of employees to act concertedly for mutual aid or protection, and that "[m]andatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of [this] substantive right." *Murphy Oil Usa, Inc.*, 361 NLRB No. 72, slip op. at 6 (citing *In Re D. R. Horton, Inc.*, 357 NLRB at 2281).

Respondent's insistence that the Federal Arbitration Act ("FAA") overrides the NLRA's protection of the right to act concertedly under the NLRA is wrong. In fact, in *Murphy Oil*, the Board considered and expressly rejected each of the same arguments that Respondent raises now.

1. The NLRA guarantees a substantive right to act concertedly.

As an initial matter, as the Board explained in *Murphy Oil*, Respondent's focus on exceptions to the FAA is the incorrect analysis. The FAA and the NLRA are both federal statutes, and "when two federal statutes 'are capable of co-existence,' both should be given effect 'absent a clearly expressed congressional intention to the contrary.'" *In Re D. R. Horton, Inc.*,

357 NLRB at 2284 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

Even under the FAA, an employer cannot extract a "prospective waiver of a party's right to pursue statutory remedies." *Murphy Oil Usa, Inc.*, 361 NLRB No. 72, slip op. at 11 (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)). In other words, the FAA does not allow for arbitration agreements to extinguish "substantive," as opposed to procedural, rights. *Id.* slip op. at 9; *see also Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016); *NLRB v. Alternative Entm't, Inc.*, 858 F.3d 393, 403 (6th Cir. 2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016). Indeed, courts regularly invalidate arbitration agreements that attempt to waive substantive rights. *Lewis*, 823 F.3d at 1160 (collecting cases).

Preventing the Board from enforcing the NLRA as to class and collective action waivers, however, extinguishes just such a substantive right. As discussed above, Section 7 of the NLRA explicitly guarantees employees' right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. This includes the right to act in concert in litigation, such as through class or collective actions. *See In Re D. R. Horton, Inc.*, 357 NLRB at 2290 n.4 (collecting cases). Prohibiting employees from participating in class or collective actions, as a condition of employment, thus eliminates employees' core, substantive NLRA right to act concertedly. *Murphy Oil Usa, Inc.*, 361 NLRB No. 72, slip op. at 2; *Lewis*, 823 F.3d at 1160 (Section 7's right to act concertedly "lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the [NLRA]."); *Alternative Entm't, Inc.*, 858 F.3d at 403. As the FAA does not require such as result, we must instead read the FAA and the NLRA together and allow the Board to continue to enforce the substantive right for employees to act concertedly in litigation.

Respondent's arguments to the contrary misunderstand the nature of the right to act

concertedly. The right to act concertedly under the NLRA is not an unlimited right to create new procedures or to have class certification be granted automatically. Rather, as the Board explained in *Murphy Oil*, it is "a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." 361 NLRB No. 72, at slip op. at 2 (emphasis in original); *see also Countrywide Fin. Corp.*, 362 NLRB No. 165, slip op. at 6 (Aug. 14, 2015). Thus, an employer does not violate the NLRA in arguing that the plaintiff has not satisfied the requirements for class certification under Federal Rule of Civil Procedure 23. But an employer does violate the NLRA in demanding, in advance of litigation, that all employees prospectively waive the right to pursue class and collective remedies as a condition of employment.

Likewise, Respondent misses the point in insisting that class and collective remedies are procedural based on cases regarding Federal Rule of Civil Procedure 23. As the Seventh Circuit aptly put it, "Rule 23 is not the source of the collective right here; Section 7 of the NLRA is." *Lewis*, 823 F.3d at 1161. Thus, the fact that class and collective remedies may be a procedural method under other rules or statutes does not mean that the substantive right to act concertedly under Section 7 of the NLRA can simply be ignored. *Id.*

2. The FAA's Savings Clause also prevents the FAA from overriding the NLRA.

In any event, even reaching the exceptions raised by Respondent under the FAA, Respondent is wrong—the FAA's Savings Clause is yet another reason that the FAA does not override the NLRA. Specifically, the FAA's Savings Clause provides that arbitration agreements may be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Board explained in *Murphy Oil*, "a federal court has a duty to determine whether a contract violates federal law before enforcing it." 361

NLRB No. 72, slip op. at 11 (quoting *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982)). As the violation of a federal law, *i.e.,* the NLRA, is a valid ground for the revocation of a contract, the Savings Clause makes clear that arbitration agreements cannot be enforced in violation of the NLRA.

Respondent's comparison to *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) is unavailing. As an initial matter, *Concepcion* concerns state law, not another federal statute. This distinction is critical, because, as discussed in Section III(A)(1) above, federal statutes are presumed to coexist and should ordinarily both be given effect. This presumption does not exist for state statutes. *See Lewis*, 823 F.3d at 1158.

But even putting the fact that the NLRA is also federal law aside, the logic of *Concepcion* is inapplicable here because the NLRA does not single out arbitration for unfavorable treatment. *Alternative Entm't, Inc.*, 858 F.3d at 406. The NLRA merely requires employers to allow employees to act concertedly. As the Seventh Circuit emphasized, arbitration agreements allowing for class arbitration would not necessarily violate Section 7. *Id.* The problem is that Respondent is using its arbitration agreement to utterly prevent collective litigation or arbitration in any form—an outcome that Section 7 prohibits.

3. Section 7 of the NLRA is a contrary congressional command.

Moreover, Section 7 of the NLRA reflects a contrary congressional command to the FAA. As Respondent recognizes, a court need not enforce an arbitration agreement in the face of a "contrary congressional command." *Italian Colors Rest.*, 133 S. Ct. at 2309. Here, as the Board explained in *Murphy Oil*, Section 7 of the NLRA constitutes a contrary congressional command to the FAA because "[t]he right to engage in concerted legal activity is plainly authorized by the broad language of Section 7." 361

NLRB No. 72, slip op. at 12. This is enough to evince a contrary congressional command. Contrary to Respondent's arguments, there is nothing requiring that the NLRA explicitly prohibit a waiver of class and collective remedies to demonstrate a contrary congressional command. *Id.* Respondent's demand that the Board revisit *Murphy Oil* and *D.R. Horton* should thus be rejected.

B. Respondent's Arbitration Agreement Interferes with and Restricts Board Processes.

Next, the ALJ was correct in concluding that Respondent's arbitration agreement interferes with Board processes. As the Board has previously held, "'[p]reserving and protecting access to the Board is a fundamental goal of the Act,' and so the Board must carefully examine employer rules that may interfere with this goal." *Ralphs Grocery Co. & Terri Brown*, 363 NLRB No. 128, slip op. at 1 (Feb. 23, 2016) (quoting *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 6 (Dec. 22, 2015)). Under the longstanding test originally set forth in *Lutheran Heritage Village*, 343 NLRB 646, 647 (2004), an employer policy interferes with or restricts Board processes when the policy explicitly restricts protected Section 7 activity or when "employees would reasonably believe the policy interferes with their ability to file a Board charge or otherwise access the Board's processes." *Id.* slip op. at 1 (citations omitted).

The right to file a charge and access Board processes includes the ability for the Board "to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures." *Id.* slip op. at 3. Any ambiguities in employer policies are construed against the employer as the drafter, and "the Board . . . recognize[s] that 'rank-and-file employees . . . cannot be expected to have the expertise to examine company rules from a legal standpoint.'" *Supply Techs., LLC*, 359 NLRB 379, 381 (2012); *Ralphs Grocery Co.*, 363 NLRB No. 128, slip op. at 1 (quoting *Solarcity*, 363 NLRB No. 83, slip op. at 5). To that end, an arbitration

agreement violates the NLRA if "as a whole [it] is not written in a manner reasonably calculated to assure employees that their statutory right of access to the Board's processes remains unaffected," even if the agreement contains language stating that employees may file charges with the Board. *Ralphs Grocery Co.*, 363 NLRB No. 128, at slip op. 2; *see also Solarcity Corp.*, 363 NLRB No. 83 slip op. at 6; *Lincoln E. Mgmt. Corp.*, 364 NLRB No. 16, slip op. at 4 (May 31, 2016).

Here, as the ALJ concluded, Respondent's overall arbitration agreement is not written in a manner reasonably calculated to assure employees that they continue to have the right to access Board processes. The arbitration agreement states in bold print that "**I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.**" Stip. at 2-3 (emphasis in original). The arbitration agreement then details that "claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status" are subject to arbitration. Stip. at 2-3. An employee would reasonably read this language as covering unfair labor practices. The later mention of filing charges with the Board, with no statement that unfair labor practices are exempt from the agreement, is too ambiguous to change the overall meaning of the agreement to the average employee. *See, e.g.*, *Ralphs Grocery Co.*, 363 NLRB No. 128, slip. op at 3.

Moreover, Respondent's arbitration agreement explicitly restricts Board remedies by stating that employees cannot recover any monetary damages through Board processes and that

employees must instead "pursue any claim for monetary relief through arbitration." Stip. at 3. By prohibiting employees from seeking monetary damages through Board processes, Respondent's arbitration agreement strips the Board of its power to pursue appropriate relief under the Act—a critical part of the Board's function. *See, e.g.*, *Ralphs Grocery Co.*, 363 NLRB No. 128, slip. op at 3. The ALJ was thus correct in concluding that this blatant restriction and interference with Board processes violates Section 8(a)(1) of the Act.

Respondent's insistence that the ALJ ignored the stipulated issue in this case is absurd. As Respondent concedes, the stipulated issue was whether Respondent's arbitration agreement "interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through board proceedings." Stip. at 3. The ALJ focused on exactly that, concluding that "a reasonable reading of the Arbitration Agreement's prohibition against monetary remedies from the Board is an added inhibition to the filing of charges." *Kelly Servs., Inc.*, 4-CA-171036, slip op. at 5. Accordingly, as the ALJ concluded, "the Arbitration Agreement precludes full recourse to the Board and thus violates Section 8(a)(1) of the Act in this additional request." *Id.*

Likewise, Respondent is wrong in claiming that interfering with and restricting Board remedies does not interfere with Board processes. As discussed above, the right to access Board processes includes not only the right for an employee to file a charge, but also for that charge to be meaningfully addressed by the Board. *See Ralphs Grocery Co.*, 363 NLRB No. 128, slip. op. at 3. This means the Board must be able "to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures." *Id.* As the ALJ recognized, prohibiting any recovery of monetary damages cuts off the Board's ability to fashion full meaningful relief in many cases and disincentivizes employees from filing charges where back

pay is the ordinary remedy. *See Kelly Servs., Inc.*, 4-CA-171036, slip op. at 5 ("Why file a charge in a case where back pay is the normal remedy if you cannot get monetary relief?"). Respondent's arbitration agreement's attempt to limit Board remedies thus plainly interferes with Board processes.

Further, contrary to Respondent's assertions, whether a particular charge seeks back pay is irrelevant to the analysis of whether a charge interferes with Board processes. Respondent is interfering with Board processes by discouraging employees from ever filing charges with the Board to begin with. Respondent's violation is not reduced by a particular employee filing a charge that does not happen to seek back pay. In other words, Respondent's violation is the restriction in the arbitration agreement itself, not how it may be applied to a particular employee.

Finally, Respondent is incorrect in suggesting that individual arbitration agreements can deprive the Board of its jurisdiction over unfair labor practices charges. As Respondent appears to recognize, Section 10(a) of the NLRA is unequivocal that "[t]he Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce," and that *"[t]his power shall not be affected by any other means of adjustment* or prevention that has been or may be established *by agreement*, law, or otherwise." 29 U.S.C. § 160(a) (emphasis added). Hence, it is well established that "the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award." *Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB No. 132, at slip op. 1 (Dec. 15, 2014); *see also Monsanto Chem. Co.*, 97 NLRB 517, 520 (1951) ("There can be no justification for deeming ourselves bound, as a policy matter, by an arbitration award which is at odds with the statute.").

Despite Respondent's assertions, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009)

does nothing to alter the NLRB's broad authority under Section 10(a). *14 Penn Plaza* concerns only whether individual employees may sue for employment discrimination after their union entered into a collective bargaining agreement calling for the arbitration of such claims. 556 U.S. at 257. There is nothing in *14 Penn Plaza* (or any other precedent cited by Respondent) stating that an arbitration agreement can limit how the Board handles unfair labor practices charges. Indeed, for this reason, the Board has already concluded that *14 Penn Plaza* is irrelevant to Board proceedings. *See Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB No. 132, slip op. at 5 n.8 ("Because of the discretionary character of the Board's deferral to arbitration, the Supreme Court's decisions in such cases as *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) . . . are not controlling here.").

Likewise, the fact that the Board can, in its discretion, defer to arbitration certainly does not mean that Respondent can dictate to the Board that it *must* relinquish its jurisdiction and defer to arbitration. Indeed, Respondent's argument is particularly nonsensical because the Board's normal logic for sometimes deferring to arbitration does not exist in this case. Specifically, the Board sometimes defers to arbitration, *as provided in collective bargaining agreements*, to promote collective bargaining and dispute resolution. *See Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB No. 132, at slip op. 4-5. That is because collective bargaining agreements, in which employees choose and bargain through unions, are the product of the exact employee collective process that the NLRA envisions and protects. *See Murphy Oil Usa, Inc.*, 361 NLRB No. 72, at slip op. 13.

In contrast, an individual arbitration agreement prohibiting collective action "is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining between a freely chosen

bargaining representative and an employer that has complied with the statutory duty to bargain in good faith." *Id.* The Board's discretion to defer to arbitration stemming from collective bargaining agreements thus lends no support to Respondent's insistence that the Board defer to the individual agreement at issue here. Accordingly, Respondent's argument has no merit and must be rejected.

C. This Case Should not be Stayed.

Lastly, the Board should not delay ruling on Respondent's Exceptions. Although true that the Supreme Court will soon consider "[w]hether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis," S.Ct. No. 16-300 (Jan. 13, 2017), the Board has already concluded that such agreements violate the NLRA and that decision is binding until any reversal. *See Teamsters, Local No. 554*, 221 NLRB 754, 756 (1975). Respondent's conjecture on how the Supreme Court or the Board may decide this issue in the future is nothing but speculation and no basis for delaying the Board's decision in this matter. Moreover, the Supreme Court's decision will not address the second issue in this matter, *i.e.*, the fact that Respondent's agreement interferes with Board processes. Any stay would thus pointlessly delay a decision on the second issue in this case.

IV. CONCLUSION

Respondent has violated and continues to violate Section 8(a)(1) of the Act by maintaining an arbitration agreement that purports to waive class and collective action remedies as to claims relating to employees' employment and that interferes with and restricts Board processes. Respondent's Exceptions should thus be rejected without delay.

Date: July 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2017, I served the Brief of Charging Party T Jason Noye in Support of Finding of Unfair Labor Practices on the following persons:

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

KELLY SERVICES, INC.

and Case 04-CA-171036

T JASON NOYE, an Individual

**STIPULATION OF FACTS,
JOINT MOTION TO SUBMIT CASE ON STIPULATION AND
JOINT MOTION REQUESTING PERMISSION TO FORGO
SUBMISSION OF SHORT POSITION STATEMENTS**

Counsel for the General Counsel of the National Labor Relations Board (General Counsel), Respondent Kelly Services, Inc. (Respondent), and Charging Party T Jason Noye (Charging Party), collectively referred to as "the Parties," hereby enter this Stipulation of Facts and jointly petition the Administrative Law Judge (ALJ), in order to avoid unnecessary costs and delay, to exercise his powers under Section 102.35(a)(9) of the Rules and Regulations of the National Labor Relations Board (Board), and decide this case on stipulation.

The Parties further request that the ALJ permit them to forgo the submission of short statements of position as described in Section 102.35(a)(9) of the Board's Rules and Regulations. The parties request instead that they be permitted to file briefs.

1. The Parties agree that this Stipulation of Facts, with attached exhibits described herein, constitutes the entire record in this case and that no oral testimony is necessary or desired by the Parties. In the event the ALJ grants this joint petition, the Parties request that the ALJ set a date for the filing of briefs at least 45 days out from the approval of this petition.

2. Upon the original, and amended charge in Case 04-CA-171036 filed by the Charging Party on March 4, 2016, and July 14, 2016 respectively (attached as ***Joint Exhibits 1 and 2***), receipt of which is hereby acknowledged by Respondent, the General Counsel of the Board, by the Regional Director for Region 4, acting pursuant to the authority granted in Section 10(b) of the Act, as amended, 29 U.S.C. §151, *et seq.*, and Section 102.15 of the Board's Rules and Regulations, issued a Complaint and Notice of Hearing (attached as ***Joint Exhibit 3***) on December 28, 2016 (Complaint). True copies of the Complaint were duly served by certified mail upon Respondent and upon the Charging Party on December 28, 2016. Respondent's Answer to the Complaint and Amended Answer to the Complaint (attached as ***Joint Exhibits 4 and 5***) were duly served upon the Regional Director for Region 4 and the Charging Party on January 11 and 12, 2017 respectively.

3. Respondent has been a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers. In conducting its operations during the past 12-month period, Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement) (attached as ***Joint Exhibit 6***), which includes, inter alia, the following provisions:

> **2. Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages,

wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

5. All documents attached as exhibits are true and correct copies of the documents described. The parties agree to the authenticity of the exhibits.

STATEMENT OF ISSUES

Based on the foregoing factual stipulations, the Parties agree that the legal issues to be resolved in this matter are whether Respondent's maintenance of the Arbitration Agreement

described above in Paragraph 4 violates Section 8(a)(1) of the Act because it: (i) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment; and (ii) interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

Signed: _____ Date: 3/30/17

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

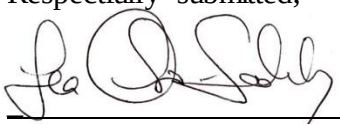
KELLY SERVICES, INC.

and **Case 04-CA-171036**

T JASON NOYE, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN RESPONSE TO RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted,



Dated: July 5, 2017

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I. INTRODUCTION

On May 23, 2017, Chief Administrative Law Judge (ALJ) Robert A. Giannasi correctly found, as alleged in the complaint, that Kelly Services, Inc. (Respondent) violated Section 8(a)(1) of the Act by maintaining a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (Arbitration Agreement) that (1) requires employees to waive their right to maintain class or collective actions in all forums, whether arbitrator or judicial, with respect to their wages, hours or other terms and conditions of employment (ALJD 4:18-22);[1] and (2) restricts employee access to Board processes by prohibiting employees from receiving back pay or other monetary compensation through Board proceedings (ALJD 5:34-36).

Respondent's Arbitration Agreement fall squarely within the ambit of the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014),), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017) and *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.2d 344 (5th Cir. 2013), which prohibit employers from imposing policies or agreements that preclude employees from pursuing employment related collective claims as a condition of employment and from restricting employees' access to Board processes. Respondent's Arbitration Agreement also falls squarely within the ambit of the Board's decision in *U-Haul Co. of California*, 347 NLRB 375, 377-378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), which made clear that mandatory arbitration policies that interfere with employees' right to file an unfair labor practice charge or otherwise restrict employee access to the Board's processes are unlawful. As the ALJ correctly decided the issues, Respondent's exceptions should be overruled.

[1] Throughout this Brief, ALJD refers to the ALJ's decision, followed by page and line numbers; SOF refers to the Stipulation of Facts, followed by the ¶ number; JX refers to the Joint Exhibits followed by the exhibit number.

II. PROCEDURAL HISTORY

On March 4, 2016, Charging Party T Jason Noye, filed a charge in Case 04-CA-171036 alleging that Respondent violated Section 8(a)(1) by maintaining an unlawful mandatory arbitration agreement. (JX-1) On July 14, 2016, the Charging Party amended the charge to add an allegation that Respondent's maintenance of unlawful arbitration agreements also restricts the remedies available in charges filed with the National Labor Relations Board. (JX-2) On December 28, 2016, the Regional Director of Region 4 issued a Complaint and Notice of Hearing alleging that Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful arbitration agreement. (JX-3) On January 11 and 12, 2017 respectively, Respondent filed its Answer to the Complaint and Amended Answer to the Complaint. (JX-4; JX-5) Because the facts in this case are not in dispute, the parties filed a Joint Motion and Stipulation of Facts. In the Joint Motion, the Parties agreed that the record in this case shall consist of the joint stipulation of facts, including all exhibits attached thereto. On March 31, 2017, the ALJ issued an Order Accepting Stipulation and Setting Briefing Dates. On May 23, 2017, the ALJ issued The ALJ issued his decision. This Answering brief is filed in response to Respondent's Exceptions to the Decision of the Administrative Law Judge.

III. STATEMENT OF THE FACTS

Respondent is a corporate entity with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, engaged in providing temporary staffing to employers. (SOF ¶1). Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained the Arbitration Agreement as a condition of employment for all employees. (SOF ¶4; JX-6). The Arbitration Agreement includes, inter alia, the following provisions:

1. Agreement to Arbitrate. Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration, instead of going to court, for any "Covered Claims" that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.

2. Claims Subject to Agreement. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

> 16. **Savings Clause & Conformity Clause**. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

IV. ARGUMENT

A. The ALJ properly found that Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment. (Exception 1)

Respondent's Exception 1 attacks the Board's decision in *Murphy Oil*. As it is clear that Respondent's Arbitration Agreement violates Section 8(a)(1) under *Murphy Oil*, Respondent challenges *Murphy Oil* itself. Respondent is correct in noting that the issue is presently before the United States Supreme Court, but fails to present any facts or argument that can support overturning the ALJ's finding at the present time.[2]

The Board's *Murphy Oil* decision firmly established that collective action in arbitration, like the collective pursuit of workplace grievances through litigation, is protected by Section 7 of the Act. *Murphy Oil*, slip op. at 6-7; See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

[2] Although the Supreme Court has granted certiorari in, and consolidated cases, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), cert. granted; *Lewis v. Epic Systems Corp*., 823 F.3d 1147 (7th Cir. 2016), cert. granted; and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), cert. granted, the Court will not hear the case until the October 2017 term. Respondent asserts that the Board should hold this case in abeyance until the Supreme Court rules on the issues presented in *D.R. Horton* and *Murphy Oil*, matter, ignoring that the second allegation of this proceeding would not be resolved by the Court's decision. Thus, this proceeding would ultimately have to be resolved by the Board in any event. Moreover, Respondent ignores the fact that it was offered the opportunity to settle the *Murphy Oil* allegation conditionally and to proceed solely on the second allegation but chose not to.

Since then, the Board has repeatedly and consistently held that agreements that require employees, as a condition of employment, to refrain from bringing collective action in any forum, either judicial and arbitral, unlawfully restrict employees' Section 7 rights. See *Bristol Farms*, 364 NLRB No. 34 (2016) (mandatory arbitration agreement which as applied precluded collective action in all forums was unlawful); *Adecco USA, Inc.*, 364 NLRB No. 9 (2016) (class waiver arbitration agreement barring the charging party from filing a private attorney general act cause of action was unlawful); *ISS Facility Services, Inc*., 363 NLRB No. 160, slip op. at 2 (2016) (maintenance of class waiver arbitration agreement unlawful); *Kenai Drilling Limited*, 363 NLRB No. 158 (2016) (maintenance and enforcement of class waiver arbitration agreement unlawful); *RPM Pizza, LLC*, 363 NLRB No. 82 (2015) (same).

As the ALJ correctly noted, the Board's holdings in *D.R. Horton, Murphy Oil* and their progeny remain Board law unless and until that position is reversed by the Supreme Court. (ALJD 4, fn. 2) See, e.g., *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004). In *Pathmark Stores*, the Board reiterated that:

> [i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise … [I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

342 NLRB 378, n. 1 (2004) (emphasis added), quoting *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964), quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957). See also, *Citigroup Technology, Inc.*, 363 NLRB No. 55, slip op. at 6 (2015); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

As set forth above in the statement of facts, and as correctly found by the ALJ, Respondent requires its employees to sign the Arbitration Agreement as a condition of employment that limits the resolution of all "Covered Claims,"—essentially any employment-related disputes—to arbitration and expressly restricts employees from participating in "any class, collective, or representative proceeding." (ALJD 4:18-22; JX-6) Even if this language was not considered an explicit prohibition on Section 7 activities, employees would reasonably construe it in that manner given the broad prohibitive language of the Arbitration Agreement. *Murphy Oil*, 361 NLRB No. 72, slip op. at 26, citing *Lutheran Heritage Village,* 343 NLRB 646, 647 (2004). By requiring employees to sign the Arbitration Agreement as a condition of employment, Respondent has attempted to foreclose all concerted employment-related litigation or arbitration by employees and effectively stripped employees of their Section 7 right to engage in this form of concerted activity for their mutual aid and protection. See e.g. *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 2 (2015). Even if Respondent's Arbitration Agreement was not a condition of employment, it would still be unlawful. *Bristol Farms*, supra, 364 NLRB No. 34, slip op at 1, fn. 3; *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

Based on the above, the ALJ correctly found that Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment. Accordingly, it is urged that the Board affirm the ALJ's findings and find a Section 8(a)(1) violation.

B. The ALJ correctly found that Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings. (Exception 2)

Respondent's Exception 2 argues that the ALJ: (1) wrongly concluded that there was an ambiguity in the language of the Arbitration Agreement that compels a violation as the Arbitration Agreement that explicitly allows for the filing of Board charges; and (2) disregarded the stipulated issue in determining that Board remedies are part of the Board's processes. Contrary to Respondent, the ALJ properly found that the Arbitration Agreement interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings. (ALD 4:10-18) Furthermore, the ALJ did not disregard the stipulated issues as the ALJ properly found that that Board remedies are part of the Board's processes. (ALJD 5-6)

1. *The ALJ properly found that the Arbitration Agreement interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.*

The Board has long recognized that "filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7." *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 4 (2016) quoting *Mesker Door, Inc.,* 357 NLRB 591, 596 (2011). Moreover, the right to file Board is meaningless unless it entails "the right to have the Board exercise its statutory powers under Section 10 of the Act: i.e., to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures." *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 3 (2016). Thus, employees' "complete freedom" to access to the Board's processes is a fundamental purpose of the Act and must be vigorously safeguarded. *NLRB v. Scrivener*, 405 U.S.

117, 122 (1972) (citations omitted); see also *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 4 (2016); *SolarCity*, 363 NLRB No. 83, slip op. at 4.

Recognizing that preserving access to the Board is "a fundamental goal of the Act," the Board must "carefully examine employer rules that interfere with this goal." *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2, citing *SolarCity Corp.*, supra. Thus, the Board has repeatedly held that mandatory arbitration policies that interfere with employees' rights to file unfair labor practice charges are unlawful. See *Dish Network, LLC,* 365 NLRB No. 47, slip op. at 2 (2017); *U-Haul Co. of California*, supra, 347 NLRB at 377–378; *Acuity Specialty Products, Inc*., 363 NLRB No. 192 (2016); *SolarCity Corp.*, supra, slip op. at 5-6; *Bill's Electric, Inc*., 350 NLRB 292, 296 (2007).

The proper test for determining whether employees would reasonably believe that a mandatory arbitration policy interferes with their ability to file a Board charge or otherwise access the Board's processes is that set forth in *Lutheran Heritage Village-Livonia,* supra. See *U-Haul Company of California*, supra. See also, e.g., *Dish Network, LLC,* supra; *SolarCity Corp.*, supra, slip op. at 5. Under that test, a policy such as Respondent's violates Section 8(a)(1) if it expressly restricts Section 7 activity or, alternatively, when (1) employees would reasonably read it as restricting such activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, supra.

Even where mandatory arbitration agreements contain a "savings clause" with explicit exclusions of claims under the Act, the Board has held that the "savings clause" language must be read in context of the complete agreement or policy to determine, under the *Lutheran Heritage* test, whether employees would reasonably believe that the policy interferes with their ability to

access the Board processes. See, e.g., *SolarCity Corp.*, supra; *Hooters of Ontario Mills*, 363 NLRB No. 2, slip op. at 1-2 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 1-3 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 fn. 4 (2015). Further, the Board "recognize[s] that 'rank-and-file employees … cannot be expected to have the same expertise [as lawyers] to examine company rules from a legal standpoint.'" *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2 quoting *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 1. Thus, the Board has long held that "employees should not have to decide at their own peril" whether an ambiguous employment rule bans protected conduct. *Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), enfd. in relevant part, 805 F.3d 309 (D.C. Cir. 2015). Therefore, any ambiguity in the rule, which could lead employees to draw from it a coercive meaning, must be construed against the employer. See *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), enfd, 746 F.3d 205 (5th Cir. 2014); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd mem., 203 F.3d 52 (D.C. Cir. 1999). The mere maintenance of an unlawful rule, even absent enforcement, constitutes an unfair labor practice. *Lutheran Heritage Village-Livonia*, supra at 649; *Lafayette Park Hotel*, supra at 825.

As correctly found by the ALJ, despite language allowing for the filing of Board charges, the Arbitration Agreement is ambiguous when read as a whole. (ALJD 5:13-14) The Covered Claims in the Arbitration Agreement encompasses "all common-law and statutory claims relating to … employment," including claims for unpaid wages, wrongful termination, discrimination, harassment, and retaliation normally reserved for the Board. This very broad language is then followed by the statement, in bold, "that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims." (JX-6,

¶ 2) This language would reasonably lead employees to believe that any claim related to their termination, wages, compensation, work hours or any other employment dispute covered under the Act, a federal statute, must be submitted to Respondent's arbitration procedures. The third paragraph, the "Exclusions from Agreement" clause, while excluding certain types of claims such as unemployment and workers compensation claims does not explicitly mention unfair labor practice claims. Further, it is only at the end of this Exclusion clause that there is any mention of allowing for the filing of administrative charges with the Board and, as described further below, that right is circumscribed. (JX-6, ¶ 3) The Exclusion clause is followed later in the agreement with the clause waiving class and collective claims. (JX-6, ¶ 8) An employee especially one without "specialized legal knowledge" would be unable to determine from this language, whether and to what extent the Arbitration Agreement's exception for filing charges with the Board modifies the broad prohibition on pursuing any form of collective or representative activity, particularly since the "Exclusions clause" does not clarify that such charges may be filed on an individual or collective basis. This ambiguity would lead a reasonable employee to question whether he may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees. *See Securitas Security Services USA, Inc.*, supra, slip op. at 4; *SolarCity Corporation*, supra, slip op. at 6-8; *ISS Facility Services, Inc.*, supra, 363 NLRB No. 160, slip op at 3. The ambiguity of the Arbitration Agreement must be construed against Respondent as the Arbitration Agreement's drafter. *Lafayette Park Hotel*, 326 NLRB at 828.

Moreover, the ALJ correctly found that "the Arbitration Agreement's token recognition of the right to file Board charges is 'illusory'… [a]nd the overall Agreement can reasonably be read to inhibit the filing of Board charges." (ALJD 5:15-17) As Respondent must acknowledge,

the Exclusion Clause does not simply allow for the filing of Board charges under the Arbitration Agreement; Respondent added a requirement that employees must waive their rights to any "monetary recovery" for administrative claims filed with state or federal government or with administrative agencies, including the Board, regardless of who filed those claims, unless they seek such monetary recovery through arbitration. (JX-6, ¶ 3) The ALJ correctly found that "a reasonable reading of the Arbitration Agreement's prohibition against monetary remedies from the Board is an added inhibition against the filing of [Board] charges." (ALJD 5:31-33) Yet, according to Respondent, this waiver does not affect employees' access to the Board's processes because employees may still file charges with the Board. Contrary to Respondent, a reasonable employee reading the Arbitration Agreement would believe that it is futile to file a charge with the Board because if the employee was successful before the Board, the employee would nonetheless not be entitled to backpay or other monetary relief through the Board's remedies and would be required to seek arbitration to obtain the remedy that the employee would be entitled to pursuant to the Board's order. *Professional Janitorial Service of Houston*, 363 NLRB No. 35 slip op at 3 (2016). See also *Bill's Electric*, 350 NLRB at 296 (Board finding arbitration and grievance agreement would reasonably be read by employees "as substantially restricting, if not totally prohibiting, their access to the Board's processes"). The provision ensures that even if someone other than an employee, such as another employee, a labor organization, or any other individual or organization, pursues a Board charge, the remedy for the Board charge would be gutted, as an employee subject to the Arbitration Agreement policy would not be entitled to any monetary remedy for that action unless through arbitration. Thus, it is clear that Respondent's Arbitration Agreement plainly interferes with the Board's processes.

2. *The ALJ did not disregard the stipulated issue and properly found Respondent's defenses to be without merit.*

The ALJ correctly dismissed Respondent's arguments defending the lawfulness of the Arbitration Agreement. (ALJD 5:38-48, 6:1-16) As recognized by the ALJ, Respondent's arguments are contrary to current Board law as espoused in *Ralph's Grocery*, supra. (ALJD 5:38-40). Even assuming that mandatory arbitration agreements, which contain language, however buried and ambiguous, that employees may file charges with the Board are lawful, under the rationale espoused by Chairman Miscimarra in *Ralph's Grocery*, Respondent's arguments still fail. Unlike *Ralph's Grocery* and other cases in which Chairman Miscimarra found mandatory arbitration agreements to allow access to the Board's processes, the Arbitration Agreement here does not. It only provides limited access.

Respondent excepted to the ALJ's finding that the Arbitration Agreement was unlawful arguing that the ALJ disregarded the stipulated issue because it "requires a finding that the Agreement "interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving back pay or other monetary compensation through Board proceedings." Respondent disingenuously argues that as the Arbitration Agreement allows employees to file charges with the Board, it is inconsequential that the employee cannot obtain monetary relief through the Board because the Board's processes do not include the Board's remedial authority. Contrary to Respondent, the ALJ did not ignore the stipulated issue. As the ALJ correctly found, remedies are part of the Board's processes. (ALJD 6:1-11) Section 10(c) of the Act provides for reinstatement and backpay, among other remedies, in order to remedy unfair labor practice charges. As the ALJ correctly noted, "[i]t is difficult to envision how, once the Board's processes have been invoked, the Arbitration Agreement could preclude the Board from exercising its full statutory powers, including its remedial authority."

(ALJD 5:23-26) The enforcement of the Act is a public, not individual, concern. As the Supreme Court recognized in *National Licorice Co., v. NLRB*, 309 U.S. 350, 364 (1940), "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act." As it has long been recognized by the Board:

> The remedy of reinstatement and backpay is not a private right, but a public right granted to vindicate the law against one who has broken it. Its object is to discourage discharges of employees contrary to the statute and thereby vindicate the policies of the National Labor Relations Act. The statute authorizes reparation orders, not in the interest of the employees, but in the interest of the public. They are not private rewards operating by way of penalty or of damages.

Clayton-Willard Sales, 126 NLRB 1325, 1326-27 (1960). Thus, the remedies for unfair labor practices are not separate from but are part and parcel of the Board's processes. Denying monetary remedies for successful Board charges, as the Arbitration Agreement does, clearly results in "substantially restricting, if not totally prohibiting, [employees'] access to the Board's processes." *Bill's Electric*, 350 NLRB at 296. Thus Respondent's Exception 2(b) is without merit.

The ALJ also correctly concluded that Respondent's convoluted argument—that the General Counsel has somehow made an arbitrary distinction between cases where a monetary remedy might be applicable and cases where it would not for determining lawfulness of the Arbitration Agreement—is not only unpersuasive but also baseless. (ALJD 5:40-42) The Arbitration Agreement is meant to take care of claims that relate to employee's employment—"including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment,

and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status." (JX-6, ¶ 2) These are the kinds of claims that if successful, there is a likelihood of monetary relief. These also include the types of cases that would result in backpay remedy if an employee was successful in a Board proceeding. Respondent knows this. While there is no doubt that not all unfair labor practice charges have merit and that not every charging party will be entitled to backpay or monetary relief, and no one argues otherwise, whether a particular charge seeks back pay is irrelevant to the analysis of whether a charge interferes with Board processes. The end result of requiring charging parties to arbitrate any monetary relief they are entitled to under the Board's remedial processes is just another obstacle to put before employees for exercising their Section 7 rights. This is the point of the Arbitration Agreement. The likelihood then is that in these circumstances a reasonable employee considering whether to file a charge with the Board concerning his or her employment would believe it would be futile to do so and would end up not filing a charge. There is no doubt that Respondent's Arbitration Agreement is exactly the type of mandatory arbitration agreement that interferes with employees' ability to access the Board processes.

The ALJ also correctly found that under current Board law, "deferral to arbitration is a discretionary policy of the Board that has been used only when the arbitration provision has been the result of a collectively bargained agreement, which is not the case here." (ALJD 6:13-16) citing *Ralph's Grocery*, 363 NLRB No. 128, slip op. at 3. As acknowledged by Respondent, deferral is discretionary by the Board. See *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 3–4 (2014). Respondent also acknowledges that current Board law only finds deferral appropriate in situations where a collective bargaining agreement between a union and an employer provides for arbitration. *Ralph's Grocery*, slip op. at 3. Respondent argues that

because the Board defers to arbitration when the arbitration has been the result of a collectively bargained agreement, the same policy reasons apply and the Board should defer to arbitration in an individual agreement as well. This argument is mistaken.[3] Respondent misconstrues the meaning of Section 10(a); incorrectly suggesting that its provision for the adjudication of claims outside of the Board's processes deprives the Board of its jurisdiction over unfair labor practices charges. However, Section 10(a) was meant as a means of making clear that the Board's authority is not limited by the adjudication of statutory claims outside of the Board's processes. As such, the Board "is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award." *Babcock & Wilcox Construction Co.*, supra, slip op at 3 citing *International Harvester Co.*, 138 NLRB 923, 925–926 (1962), enfd. 327 F.2d 784 (7th Cir.1964), cert. denied 377 U.S. 1003 (1964). Moreover, even where the Board defers to arbitration, it reserves the right to review the arbitral decision to ensure that employees' Section 7 rights are protected. *Babcock & Wilcox Construction Co.*, slip op. at 4-6. Here, however, Respondent is seeking to ***require*** individual employees to arbitrate unfair labor practice claims that would otherwise be resolved by the Board under the Act's procedures, without recourse or review by the Board. This is contrary to the policies of the Act, which seek complete freedom for employees to participate in the Board's processes. Such a requirement "necessarily interferes with employees' statutory right of access to the Board." *Ralph's Grocery*, supra, slip op. at 3. Thus, the ALJ correctly dismissed this defense. Accordingly, Respondent's argument has no merit and must be rejected.

Respondent's final argument concerning non-Board settlements is also without merit.

[3] Respondent's reliance on *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 257 (2009) is misplaced. See *Babcock & Wilcox Construction Co*., slip op. at 5 fn. 8 ("Because of the discretionary character of the Board's deferral to arbitration, the Supreme Court's decisions in such cases as *14 Penn Plaza LLC v. Pyett*, 556 U. S. 247 (2009)... are not controlling here. ").

Respondent confuses the Board's approval of settlements, both Board and non-Board, with the arbitration required here. Contrary to Respondent's characterization of non-Board settlements, the Board has made it clear that it will reject settlements that are repugnant to the Act or Board policy. *Independent Stave Co.*, 287 NLRB 740, 741 (1987). Furthermore, the Agency recognizes that individual charging parties may unwittingly enter into non-Board settlements that are repugnant to the Act. This concern is reflected in Agency policy. Section 10142 of the Case Handling Manual states: "In those situations where alleged discriminatees are not represented by counsel, caution should be exercised to ensure that the non-Board settlement is not repugnant to the purposes of the Act or that advantage has not been taken of an individual in private negotiations." Thus, in a non-Board settlement, the parties negotiate to reach a mutually satisfactory resolution of the unfair labor practice charge within the parameters set by the Board and Agency Policy, including backpay .[4] Arbitration, however, is not negotiation.[5] Under the Arbitration Agreement, an employee would have the burden of proving to an arbitrator that he or she is entitled to a monetary settlement as well as the amount. Furthermore, unlike the situation in the Arbitration Agreement, individual charging parties are not compelled or required to enter into a non-Board settlement, but can insist on a Board settlement. And, obviously, if there is no settlement, the Board can order that the individual be made whole, including backpay, benefits and search-for-work and interim employment expenses—a make whole remedy unlikely to be instituted by an arbitrator. Thus, under the Arbitration Agreement, the remedy for a Board charge would be gutted, without review and even if repugnant to the Act. Accordingly, Respondent's argument has no merit and must be rejected.

[4] Respondent's argument that backpay amounts in settlements may not always be 100 percent misses the point that Board and Agency policy seeks to make discriminatees whole and thus requires review when a settlement does not.

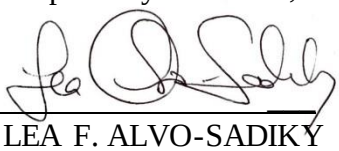
[5] Nor is the Arbitration Agreement here reached through negotiation, as it is a condition of employment. See *Ralph's Grocery*, supra.

Based on the above, the ALJ correctly found that the Arbitration Agreement would reasonably be read by employees to restrict their statutory right of access to the Board. By maintaining the Arbitration Agreement, Respondent has interfered with employees' Section 7 right to file charges with the Board and avail themselves of the Board's processes in violation of Section 8(a)(1) of the Act.

V. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Board reject Respondent's exceptions. The clear preponderance of all the relevant evidence demonstrates that the ALJ's findings of fact, conclusions of law, remedy and order were fully supported by the record evidence and established Board law.

Respectfully submitted,



Dated: July 5, 2017

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KELLY SERVICES, INC.,

And **Case 04-CA-171036**

T. JASON NOYE, an Individual

KELLY SERVICES, INC.'S REPLY TO THE CHARGING PARTY'S AND THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent Kelly Services, Inc. ("Respondent" or "Kelly") hereby files this Reply Brief in Support of its Exceptions to the decision of the Administrative Law Judge Robert A. Giannasi ("ALJ").

INTRODUCTION[1]

This case concerns Kelly's Dispute Resolution and Mutual Agreement to Binding Arbitration ("Agreement"). The Agreement provides that employees who sign it will arbitrate their employment-related claims on an individual basis, thereby waiving participation in collective or class actions. (ALJD at 2:27-39.) The Agreement also contains a section explicitly stating that employees can file administrative charges, including charges with the NLRB. (ALJD at 2:40-3:12.) The ALJ found both of these sections of the Agreement to be unlawful. (ALJD at 6:20-30.)

[1] Throughout this Reply, references are made to the ALJ's Decision as "ALJD at ___," to the Counsel for the General Counsel's Answering Brief in Response to Respondent's Exceptions to the Administrative Law Judge's Decision as "GC at p. ___," and to the Brief of Charging Party T. Jason Noye in Opposition to Respondent Kelly Services, Inc.'s Exceptions to the Decision of the Administrative Law Judge as "CP at p. ___."

The contentions of the General Counsel ("GC") and the Charging Party ("CP") regarding Respondent's exceptions to both allegations are unpersuasive for multiple reasons. With respect to the collective/class action waiver provision, the GC and the CP disregard the overwhelming authority supporting Respondent's position that collective/class action waivers are lawful, and the fact that the Department of Justice recently filed briefs with the Supreme Court in support of Respondent's position. The GC and the CP also disregard the fact that the legality of these waivers is currently an issue pending review by the U.S. Supreme Court in three consolidated cases: *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert granted*, S. Ct. No. 16-307 (Jan. 13, 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert granted*, S. Ct. No. 16-285 (Jan. 13, 2017); and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), *cert granted*, S. Ct. No. 16-300 (Jan. 13, 2017) (referred to collectively herein as the "Consolidated Appeals"). The GC and the CP seek that the Board ignore this opposing case law and the pending Supreme Court review — all to haphazardly obtain a fast "resolution" in the instant case. (CP at p. 13; GC at pp. 4-6.)

With respect to the second issue, the GC and the CP erroneously contend that the section in the Agreement providing that charges may be filed with the NLRB is ambiguous because the language is not clear as to whether or not employees can file charges and because this same language does not explicitly state "unfair labor practices." (GC at pp. 9-10; CP at p. 9.) The Agreement clearly states that employees may file charges: "I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB")." (ALJ at p. 2.) There is also no authority for requiring the term "unfair labor practices" to be included in the Agreement.

The GC and the CP also contend that the monetary remedy limitation in the Agreement is unlawful, but they fail to provide any authority opposing Respondent's Exceptions. (GC at pp. 12-14; CP at pp. 10-11.) Moreover, while the GC contends that the Board's enforcement of the Act is for the "Public Good," this contention has no bearing on whether or not the monetary remedy limitation is lawful. (GC at pp. 12-13.) Accordingly, Respondent respectfully requests that the Board find merit to Respondent's Exceptions to the Decision of the Administrative Law Judge and dismiss the Complaint in its entirety.

ARGUMENT

I. Despite The Fact That The Agreement's Class Action Waiver Will Be Decided by The Supreme Court, The GC And The CP Want The Board To Ignore The Posture Of The Consolidated Cases And Rush To Judgment

The opposition of the Charging Party and the GC to Respondent's Exceptions with respect to the collective/class action waiver are all based on existing Board law, which has been challenged, rejected by several Courts of Appeals, and the legality of which is currently an issue pending review by the U.S. Supreme Court in the Consolidated Cases. *See Murphy Oil USA, Inc.*, 808 F.3d at 1013; *Epic Sys. Corp.*, 823 F.3d at 1147; and *Ernst & Young LLP*, 834 F.3d at 975. Given this posture, Kelly will not respond to the GC's and the CP's opposition to Kelly's analysis as to why the Board is wrong in its interpretation of the rights set forth under the Act and in its attempt to trench on the Federal Arbitration Act ("FAA").

Rather, for purposes of its Reply, Respondent addresses the GC's and the CP's blatant attempt to ignore the current posture of this issue. The GC and the CP fail to address the substantial and compelling case law that has developed throughout the country on this issue. (*See generally* CP's and GC's Briefs.) Instead, the GC and the CP contend that Respondent's exceptions have no merit because the Board in *Murphy Oil* has found these type of agreements to be unlawful:

> Although true that the Supreme Court will soon consider "[w]hether the collective bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis," S. Ct. No. 16-300 (Jan. 13, 2017), the Board has already concluded that such agreements violate the NLRA and that decision is binding until any reversal.

(CP at p. 13; *see also* GC at p. 4.)

The reasoning of the CP and the GC – that *Murphy Oil* is dispositive and that it is irrelevant that this issue is before the Supreme Court – shows once again the GC's disregard for its powers and its standing vis-a-vis Circuit Courts and the Supreme Court. Even a simple review of the NLRB's website makes clear that the Board cannot compel enforcement of own orders — the Board must seek enforcement in the Circuit Courts. NLRB, *www.nlrb.gov/what-we -do/enforce-orders.* Similarly, the Supreme Court, as should be obvious, has final review of the Board's decisions. Given that the Supreme Court is currently reviewing the legality of such agreements, the Supreme Court – and not the Board – will determine the enforceability of arbitration agreements containing waivers of class/collective litigation under the National Labor Relations Act ("NLRA" or "Act"). Accordingly, the GC's and the CP's position that the Board should simply resort to its position in *Murphy Oil* makes no sense. The reality is that the NLRB's decision will not be enforced if it runs afoul of the Supreme Court's decision and the pursuit to rush to issue a haphazard decision in this case will be a complete waste of judicial resources. Accordingly, it is Respondent's position that this case should be stayed pending the Supreme Court's decision.

II. The Opposition Of The GC And The CP To Respondent's Exceptions To The Alleged Restriction In the Agreement On Filing Charges Have No Merit

A. There Is No Ambiguity In The Agreement's Language

The GC and the CP oppose the Respondent's exceptions by contending that the Agreement is ambiguous as to whether or not employees are allowed to file charges because: (1) the language in the Agreement does not clearly state that employees can file charges (GC at pp. 8-9; CP at p. 8); and (2) the section addressing the exclusions does not use the term "unfair labor practices." (GC at p. 9; GC at p. 10.) Neither contention has merit.

There is nothing unclear about the specific exclusions. While the second paragraph of the Agreement provides the claims that are subject to the Agreement, the third paragraph, located on the first page of the Agreement, commences with a bold caption that states **"Exclusions from Agreement"** and also states, "I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB")." (ALJD at 3:5-11.) The exclusionary language explicitly explains that charges under the "National Labor Relations Board" and "NLRB" are excluded. (*Id.*) Thus, there is no ambiguity. *See also ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 7 (Apr. 7, 2016) (Chairman Miscimarra criticizing the majority for "selectively" focusing on language that broadly stated that the agreement applied to "any claims," while ignoring the language that explicitly allowed for the filing of charges, which made it clear that employees were allowed file charges with the NLRB.)

Nevertheless, the GC and the CP contend that "rank and file" employees cannot be expected to examine this Agreement from a legal standpoint and that as written, the language is unclear. (CP at p. 8; GC at p. 9.) Yet, nothing can be clearer than: "I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB")." (ALJD at 2:40-3:12.) There is no need to be a lawyer to understand what this one sentence states. In fact, in *Solarcity Corp.*, 363 NLRB No. 83 (Dec.

22, 2015), Chairman Miscimarra explained the illogic of the position that the CP and GC are now taking here:

> Even though the Agreements expressly state employees retain the right to "file a charge or complaint with the National Labor Relations Board," my colleagues make a three-stage argument that the class-action waiver in the Agreements creates "an inherent ambiguity" because (i) the Agreements state that employees "waive any right to pursue or participate in any dispute on behalf of … any class, collective or representative action, except to the extent such waiver is expressly prohibited by Law," (ii) an NLRB charge sometimes "purports to speak to a group or collective concern," and (iii) the Agreements' class-action waiver would interfere with the filing of charges that speak to group or collective concerns is "expressly prohibited by the law." The problem with this argument is its false, circular premise that the Agreement's class-action waiver can be construed to interfere with the filing of Board charges, despite other language in the Agreements that specifically addressed Board charge-filing and contradicts such a construction. As noted previously, the Agreements categorically *permit* the filing of Board charges--all Board charges, including those that "purport[]to speak to a group or collective concern." Here as well, specialized legal knowledge is not required to understand what the Agreements mean. Rather, only lawyers could argue for the interpretation reflected in my colleagues' three-stage "inherent ambiguity" analysis.

Id. at slip. op. 10. Hence, there is nothing unclear about the exclusionary language in the Agreement.

Further, both the GC and the CP also contend that the exclusionary language in the Agreement is ambiguous because it does not "explicitly mention unfair labor practice claims." (GC at p. 10; *see also* CP at p. 9.) This contention is without a basis. The NLRA refers to the filing of "charges" not "unfair labor practices." *See, e.g.*, 29 U.S.C. § 153(d); 29 U.S.C. § 158(a)(4). The NLRB's Form NLRB-501 is titled "Charge Against Employer," not "Unfair Labor Practice Against Employer." *See* NLRB, *https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3040/nlrbform501.pdf.* In addition, if an employee wants to file a charge against an employer through the NLRB's website, the employee has to go to the "E-File Charge/Petition" section of the website. *See* NLRB, *https://apps.nlrb.gov/chargeandpetition/#/.* Given the terminology used by the NLRB and in the

NLRA, this contention is illogical. Neither the GC nor the CP provided any legal support for their position. While the CP cited to *Ralph's Grocery Co.*, 363 NLRB No. 128 (Feb. 23, 2016), there is nothing in the case that states that an employer must use "unfair labor practice" when describing the types of claims that are excluded from the mandatory arbitration provisions. The GC did not cite to any authority. Accordingly, there is no merit to this allegation.

B. The Limitations On Back Pay Do Not Violate The Act

The GC and the CP also erroneously contend that due to the language in the Agreement that states that employees cannot obtain back pay through the filing of charges, the agreement is unlawful because it "discourages" employees from filing charges as they "would believe it is futile to file a charge with the Board." (CP at p. 11; GC at p. 11.) The GC cites to two cases for support; however, neither case addresses this issue. (GC at p. 11.) The first case, *Professional Janitorial Service of Houston*, 363 NLRB No. 35, slip op. at 3 (2016), does not address anything related to back pay or monetary awards. Rather, in that case the Board analyzed whether or not an arbitration agreement that stated that "non-waivable statutory claims, which may include . . . the National Labor Relations Board," was unlawful because it was not clear what constituted "non-waivable statutory claims." *Id.* at slip op. 3. Equally as irrelevant is *Bill's Electric*, 350 NLRB 292 (2007), the second case cited by the GC. There, the issue was whether or not an employment application was lawful where it stated that the employee could file NLRB charges, but such charges would have to be stayed pending the mandatory arbitration process and that if the charge proceedings were not stayed, the employee would have to pay the litigation costs incurred in compelling compliance with the agreement's process. *Id.* at 296.

Furthermore, separate from the fact that the GC's and the CP's position is unsupported by any cited case law, their argument fails on its face. The CP and the GC contend that non-lawyer

employees would read the Agreement's language, know whether or not they are entitled to monetary remedies based on their allegations, and based on their analysis as to whether or not they would be entitled to monetary remedies, decide whether or not to file charges. This runs afoul of the very same case law that both the CP and the GC cite with respect to employees not being able to analyze the Agreement as lawyers: "rank-and-file employee . . . cannot be expected to have the same expertise [as lawyers] to examine company rules from a legal standpoint." (GC at p. 9; CP at p. 8.) (citations omitted.) Here, the GC's and the CP's position assumes that employees would use legal expertise when reading the Agreement and be discouraged from filing a charge based on their understanding that no monetary remedies would be provided through the filing of a charge.

Finally, the GC contends that the limitation on monetary relief through the NLRB's processes is unlawful because:

> The Arbitration Agreement is meant to take care of claims that relate to employee's employment—"including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status." . . . . These are the kinds of claims that if successful, there is likelihood of monetary relief. These also include the types of cases that would result in backpay remedy if an employee was successful in a Board proceeding. Respondent knows this.

(GC at pp. 13-14.) This is not correct. All these listed categories concern violations that do not fall under the NLRB's purview. Notably, "unfair labor practices" is not included in that list. Thus, while the listed type of claims may result in monetary remedies, the NLRB has no authority over these claims.

Accordingly, neither the GC's nor the CP's contentions that reasonable employees would be discouraged from filing charges because of the monetary limitations in the Agreement have any merit.

C. The GC's "Public Good" Arguments Are Not Dispositive

Finally, the GC asserts that the limitation on monetary remedies is unlawful because it is a limitation on the Board in that the Board's "enforcement of the Act is a public, not individual, concern." (GC at p. 13.) This contention is not relevant with respect to whether or not the limitation on monetary remedies is unlawful. Employees are allowed to enter into contractual agreements with their employers that may limit their ability to proceed through the NLRB's processes. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). In *14 Penn Plaza*, the Supreme Court held that a collective bargaining agreement between a union and an employer could lawfully provide for the arbitration of claims arising out of a statute. *Id.* at 258 ("having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"). However, the Supreme Court carefully noted that: "**[n]othing in the law suggest a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.**" *Id.* at 258 (emphasis added). Therefore, the Supreme Court has made clear that individuals can enter into contracts through which they can agree to arbitrate statutory claims and obtain any warranted monetary relief through arbitration. Hence, it does not follow that an employer would somehow violate the Act by entering into the very agreements the Supreme Court has ruled parties can enter into to redress their statutory claims.

Moreover, the Board's powers are limited by employees' individual choices. For example, though the enforcement of the Act may be perceived as "a public, not individual, concern," the Board cannot *sua sponte* investigate issues and file its own charges. *See* 29 U.S.C. § 153(b); 29 U.S.C. § 153(d). The Board is limited to investigating and remedying only those unfair labor practices that individuals file with the Regions. *See id.* Moreover, the charging

parties have the right to solicit withdrawals of their charges. *NLRB Case Handling Manual*, Part 1, Unfair Labor Practice Proceedings, § 10130.2 (February 2017). Regional offices allow charging parties to withdraw their charges for various reasons, including in response to the parties reaching non-Board settlements. *NLRB Case Handling Manual*, Part 1, Unfair Labor Practice Proceedings, § 10140 (February 2017) ("In addition to Board settlements, unfair labor practice charges may be resolved through *a specific agreement between the parties*, including grievance settlements, or as a result of unilateral action taken by the charged party which satisfies the CP. Non-Board adjustments result in the withdrawal of the charge or, in limited circumstances, dismissal.") The withdrawal of a charge effectively ends the investigation and potential enforcement of the Act. Thus, while the Board's enforcement of the Act may be a public concern, such a "concern" does not provide any basis for finding the Agreement to be unlawful.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Board find merit to Respondent's Exceptions to the Decision of the Administrative Law Judge and dismiss the Complaint in its entirety.

Respectfully submitted,

KELLY SERVICES, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of this Reply Brief to be served upon the Board via electronic filing and the following counsel of record via email on this 18th day of July, 2017:

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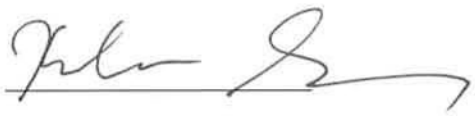

Kelly Services, Inc. *and* T. Jason Noye. Case 04–CA–171036

December 12, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On May 23, 2017, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order.[2]

On March 30, 2017, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, the parties submitted a joint motion and stipulation of facts, in which they jointly moved to waive a hearing and authorize the judge to issue a decision based on the stipulation of facts and the parties' briefs. By order dated March 31, 2017, Judge Giannasi granted the parties' joint motion. Based on the factual stipulations, the parties agreed that the legal issue to be resolved was, in relevant part, whether the Respondent's maintenance of a mandatory arbitration agreement violates Section 8(a)(1) of the Act because it "interferes with and restricts employee[s'] access to Board processes by prohibiting [them] from receiving backpay or other monetary compensation through Board proceedings." The judge answered that question in the affirmative, and we agree for the reasons set forth below.[3]

Since on or about September 5, 2015, the Respondent has maintained, as a condition of employment for all employees, a corporate-wide policy called the Dispute Resolution and Mutual Agreement to Binding Arbitration ("arbitration agreement" or "agreement"). In pertinent part, the agreement contains the following provisions:

> **1. Agreement to Arbitrate.** Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration, instead of going to court, for any "Covered Claims" that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.
>
> **2. Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termina-

[1] Applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the judge found that the Respondent violated Sec. 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. On May 21, 2018, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612, a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration violate the Act. Id. at __, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate the Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act (FAA). Id. at 1619, 1632. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the arbitration agreement is unlawful based on *Murphy Oil* must be dismissed.

[2] We shall modify the recommended Order to conform to the violations found and in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

[3] The judge also found that the agreement violated Sec. 8(a)(1) because it was ambiguous as to whether employees retained the right to file charges with the Board. In our view, that finding is outside the scope of the stipulated issue; therefore, we do not pass on it. We express no opinion whether *Ralph's Grocery Co.*, 363 NLRB No. 128 (2016), on which the judge and our colleague rely, was correctly decided, but we note that the parties in that case broadly stipulated that the issue to be decided was whether the employer's maintenance of the arbitration agreement "violate[d] . . . the Act because employees would reasonably conclude that [its] provisions . . . preclude them from filing unfair labor practice charges with the Board . . . ." Id., slip op. at 8 fn. 20 (Member Miscimarra, concurring in part and dissenting in part). Here, in contrast, the stipulated issue is much narrower: whether the arbitration agreement interferes with employees' access to the Board *in a particular way*.

Member McFerran would affirm the judge's finding on this point. In her view, the stipulation fairly encompasses the question whether the arbitration policy interfered with employees' right to file charges. As her colleagues recognize, an express limit on employees' ability to obtain a Board remedy reasonably inhibits those employees from filing charges at all. See, e.g., *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 2 (2016) (policy language stating that arbitration was the "sole and exclusive remedy" for covered disputes reasonably cast doubt on employees' ability to file unfair labor practice charges, notwithstanding additional policy language purporting to preserve access to the Board). That connection suffices both to bring the charge-filing issue within the scope of the stipulated issue and to affirm the judge's finding.

tion, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** [Emphasis in original.]

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, *but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.* [Italics added.]

The Judge's Findings

The judge found, in relevant part, that the agreement's restriction on monetary relief violated Section 8(a)(1) by precluding full recourse to the Board. He reasoned that it was difficult to envision how the Board could be precluded from exercising its full statutory powers, including its remedial authority, once its processes have been invoked. The judge noted that the Board's remedies often provide for backpay to make employees whole, and that backpay is "a specific statutory remedy set forth in Section 10(c) of the Act." The judge also observed that "[b]ecause the Board enforces public, not private, rights, it is doubtful that any private rule could preclude the Board from providing a monetary remedy authorized by a statute of the United States."

The Parties' Arguments

The Respondent argues that the section of the agreement's Exclusions paragraph that prohibits employees from recovering backpay or other monetary compensation through Board proceedings is lawful because (1) although Board law prohibits restricting access to the Board's processes, backpay is a remedy, not a process; (2) claims arising under a statute can be resolved through arbitration; (3) Section 10(a) of the Act recognizes the existence of agreed-upon methods of resolving unfair labor practices, and Section 9(a) preserves employees' right, as individuals, to present and adjust grievances at any time; (4) Board precedent embraces deferral to arbitration; and (5) Board practices allow for Board and non-Board settlements, which are the outcome of negotiations and which often result in discriminatees' receiving less than full backpay.

The General Counsel and the Charging Party argue that the waiver of the right to a monetary recovery through Board proceedings and the requirement that employees "pursue any claim for monetary relief through arbitration under this Agreement" would lead reasonable employees to believe that filing unfair labor practice charges with the Board is futile. They further argue that the Board's remedies for unfair labor practices are not separate from, but are part and parcel of, the Board's processes. Finally, they dispute the Respondent's contentions that the Board's deferral and settlement policies support a finding that the Exclusions paragraph is lawful.

Applicable Law

The judge analyzed the arbitration agreement under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which was extant law at the time the judge issued his decision. However, in *Boeing Co.*, 365 NLRB No. 154 (2017), the Board overruled the "reasonably construe" prong of *Lutheran Heritage* and held that in considering whether an employer has lawfully maintained a facially neutral policy, rule, or handbook provision, the Board will evaluate (1) the nature and extent of the rule's potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. Id., slip op. 3. In so doing, the Board will "'strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,'" viewing the rule from the employees' perspective. Id. (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (emphasis omitted). "As the result of this balancing, . . . the Board will delineate three categories" of work rules:

- *Category I* will include rules that the Board designates as lawful to maintain, either because (i)

> the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule . . . .
>
> - *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
> - C*ategory 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original).

Recently, in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), the Board applied *Boeing* and found that although the arbitration agreement at issue did not explicitly prohibit the filing of a charge, "when reasonably interpreted, [it] interfere[d] with the exercise of the right to file charges with the Board." Id., slip op. at 6. Further, the Board concluded that "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id. Finally, the Board placed provisions that restrict employees' access to the Board by making arbitration the exclusive forum for the resolution of all claims in *Boeing* Category 3, which designates rules and policies that are unlawful to maintain. Id. at 7.

Analysis

We find that the Respondent's arbitration agreement is unlawful on two grounds. First, applying *Boeing* and *Prime Healthcare*, we find that the agreement restricts access to the Board and its processes by prohibiting employees from receiving backpay or other monetary compensation through Board proceedings.[4] For this reason, the agreement violates Section 8(a)(1) as alleged. Second, the agreement is contrary to policies embedded in Section 10 of the Act. It impermissibly seeks to limit the Board in effectuating the policies of the Act, in the public interest, through the exercise of its remedial powers under Section 10(c). Moreover, because the agreement seeks to limit the Board's exercise of its remedial powers and those powers are part of the Board's broader power to prevent unfair labor practices, the agreement is also contrary to Section 10(a) of the Act. We consider these grounds in turn.

Preliminarily, we recognize that the Respondent's agreement differs from the arbitration agreement at issue in *Prime Healthcare*, which, when reasonably interpreted, restricted the filing of charges with the Board by making arbitration the exclusive forum for claims arising under the NLRA. In contrast, the agreement at issue here expressly allows employees to file charges with the Board.[5] Recently, we found lawful an arbitration agreement that contained a sufficiently prominent "savings clause" preserving employees' rights to file a Board charge or participate in any Board investigation or proceeding. *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019). We need not determine, however, whether the "savings clause" in the instant case passes muster under *Briad Wenco* because the agreement at issue here contains other language that renders it materially different from the arbitration agreement in that case.

The Respondent's agreement requires employees to "giv[e] up the opportunity to recover monetary amounts from [unfair labor practice] charges . . . . In other words, [they] must pursue any claim for monetary relief through arbitration under this Agreement." Under the agreement, the Respondent's employees are prohibited from recovering backpay or other monetary remedies ordered by the Board. In *Prime Healthcare*, however, we held that "Section 7 of the Act protects the right of employees to utilize the Board's processes," 368 NLRB No. 10, slip op. at 4, and the right to utilize those processes includes the right to invoke the exercise of the Board's statutory powers under Section 10 of the Act, including its power to determine appropriate relief for violations found. Section 10(c) of the Act grants the Board "broad, discretionary" authority to order remedies that will "effectuate the policies" of the Act, including backpay. See 29 U.S.C. §160(c); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). By making it impossible to receive Board-ordered backpay, the agreement interferes with employees' access to this aspect of the Board's processes.

Moreover, we agree with the General Counsel and Charging Party that because the agreement makes it impossible to obtain a monetary remedy from the Board, it undermines the incentive to file a charge in the first

[4] Member McFerran acknowledges that *Boeing* is currently governing law and joins the majority for institutional reasons, but she adheres to and reiterates her dissent in that case.

[5] On the other hand, by prohibiting employees from securing any monetary remedy from the Board, the agreement removes much of the incentive to file a charge in the first place.

place, notwithstanding language in the agreement that employees are not barred from doing so. And for the reasons we explained in *Prime Healthcare*, any interference with Board charge filing is unacceptable because without a charge, the Board is powerless to issue complaint. See 368 NLRB No. 10, slip op. at 4-5; *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967) ("Implementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge."); *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968) ("The policy of keeping people 'completely free from coercion' [] against making complaints to the Board is . . . important in the functioning of the Act as an organic whole.") (quoting *Nash*, 389 U.S. at 238). For this reason as well, we find that the agreement interferes with employees' access to the Board and its processes.

Even assuming that under the Respondent's agreement, arbitrators would invariably award employees the same compensation the Board would order,[6] employees' right to utilize the Board's processes would still be impaired. A Board order awarding backpay is enforceable in the Federal courts of appeals, and a court-enforced Board order may furnish the basis for a petition to hold a noncomplying employer in civil contempt. Under the Respondent's agreement, employees would not have the benefit of these further processes.

For these reasons, the language in the Exclusions paragraph at issue here belongs squarely within Category 3 of *Boeing* because, as we stated in *Prime Healthcare*, "it significantly impair[s] employee rights, the free exercise of which is vital to the implementation of the statutory scheme established by Congress in the National Labor Relations Act[, and n]o legitimate justification outweighs, or could outweigh, the adverse impact of such provisions on employee rights and the administration of the Act." Id., slip op. at 7.

Additionally, the agreement's prohibition on employees receiving Board-ordered remedies also carries with it a reciprocal limitation on the Board's exercise of its power to award those remedies: even if the filing of a charge ultimately resulted in a Board-ordered backpay remedy, the Board would order that remedy in vain if the charging party cannot accept it. Further, this limitation is not a merely private matter affecting only the private rights of the Respondent's employees. Although a backpay remedy compensates employees for losses caused by unfair labor practices, Board-awarded backpay is unlike court-awarded damages in litigation. In the latter, plaintiffs seek to vindicate private rights by securing compensation for their injuries, including lost income resulting from employment discrimination. In contrast, Board proceedings, and Board-ordered remedies, serve a public purpose. Section 10(c) of the Act empowers the Board, among other things, to require violators "to take such affirmative action including reinstatement of employees with . . . backpay, *as will effectuate the policies of this Act*" (emphasis added). In turn, Section 1 of the Act declares it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred . . . by protecting the exercise by workers" of their rights under Section 7 of the Act. Consistent with these statutory provisions, the Supreme Court has recognized that "[m]aking . . . workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941); see also *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 175 (2d Cir. 1965) (stating that Board-ordered backpay "has the twofold purpose of reimbursing employees for actual losses suffered as a result of a discriminatory discharge and of furthering the public interest in deterring such discharges").[7] And the Board itself has long recognized that it performs its function "in the public interest and not in vindication of private rights." *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957). It is therefore apparent that the Exclusions paragraph of the Respondent's arbitration agreement does not merely entail loss of access by employees to Board-ordered monetary remedies. It also constitutes an attempt to limit the Board's exercise of its powers in the public interest under Section 10(c) of the Act.[8]

[6] The arbitration agreement does not state that the remedies available under that agreement would differ from those available pursuant to the statutes under which claims submitted to arbitration would arise, including the NLRA, and we do not assume that such statutory remedies are unavailable in the Respondent's arbitral forum. We do note, however, that if and to the extent they are, the arbitration agreement would present another difficulty, since the Federal Arbitration Act does not compel enforcement of arbitration agreements that require a prospective waiver of a party's right to pursue statutory remedies. See *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235-236 (2013) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 fn. 19 (1985)).

[7] See also *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261, 265 (1940) ("The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.").

[8] We are aware that arbitration agreements often contain provisions, like the one at issue here, that make damages recoverable in the arbitral forum only. But such a provision as applied to the Board raises issues that do not arise with respect to other Federal agencies, such as the

Moreover, the Board's remedial powers are an aspect of its broader power to prevent unfair labor practices, and Congress has provided that this broader power "shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement*, law, or otherwise." Sec. 10(a) of the Act (emphasis added). Accordingly, the portion of the Exclusions paragraph at issue here contravenes Section 10(a) as well as Section 10(c).

Based on the foregoing, we find that the Exclusions paragraph of the Respondent's arbitration agreement is unlawful because it restricts employees' access to the Board and its processes, it purports to circumscribe the exercise of the Board's remedial powers in the public interest under Section 10(c) of the Act, and it seeks to limit the Board's power to prevent unfair labor practices contrary to Section 10(a) of the Act. Inherent in these findings are both our rejection of the Respondent's arguments that backpay is a "remedy, not a Board process," and our understanding that Section 10(a) of the Act recognizes the existence of agreed-upon methods of resolving unfair labor practices. Indeed, as shown, Section 10(a) militates against the Respondent's position.[9]

We find equally unavailing the Respondent's reliance on Section 9(a) of the Act. That section preserves the individual right of an employee to present a grievance directly to the employer despite being represented by an exclusive collective-bargaining representative and despite the existence of a collectively-bargained agreement, so long as certain conditions are met. It has nothing to do with an arbitration agreement between an employer and its unrepresented employees and is therefore inapposite to the Exclusions paragraph.

Finally, we reject the Respondent's attempts to justify the Exclusions paragraph based on the Board's discretionary practice of deferring to arbitration[10] and its practice of permitting parties to settle unfair labor practice charges. Nothing in that paragraph or elsewhere in the arbitration agreement allows for Board review of an arbitral decision; to the contrary, the agreement provides for "binding" arbitration. In contrast, under its deferral precedent, the Board has long and consistently reserved to itself the right to review arbitral decisions to ensure certain criteria have been met. See *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014) (postarbitral deferral); *Olin Corp.*, 268 NLRB 573 (1984) (same); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) (same); *Collyer Insulated Wire*, 192 NLRB 837 (1971) (providing for pre-arbitral deferral but retaining jurisdiction to ensure conformity with the standards set forth in *Spielberg*).[11] In the case of settlements, the settling parties effectively negotiate a resolution, but the Board retains jurisdiction and applies a reasonableness standard to ensure the vindication of Section 7 rights. See *Independent Stave*, 287 NLRB 740 (1987). The procedures set forth in the Respondent's arbitration agreement, and imposed as a condition of employment, are not analogous.[12]

Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining the arbitration agreement.

Equal Employment Opportunity Commission (EEOC) or the Wage and Hour Division of the Department of Labor (WHD). This stems from the fact that laws administered by these agencies (such as Title VII of the Civil Rights Act and the Fair Labor Standards Act) provide aggrieved individuals a private right of action and vindicate private rights in addition to public rights; whereas there is no private right of action under the NLRA, and the General Counsel litigates a charging party's claim—if he deems it to have merit—"in the public interest and not in vindication of private rights." *Robinson Freight Lines*, supra. Thus, as applied to claims within the purview of the EEOC or WHD, a provision like the one at issue here merely substitutes an arbitral for a judicial forum as the venue within which to seek a private monetary remedy. But as applied to claims arising under the NLRA, the Respondent's agreement substitutes a private remedy for one that Congress intended would primarily serve the public interest, and an arbitral remedy for one ordered by the Board as the "instrument" created by Congress "to assure protection from . . . unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers*, supra.

[9] We have no quarrel with the Respondent's contention that claims arising under a statute can be resolved through arbitration. It is not the fact that the Respondent's agreement requires claims arising under the Act to be arbitrated that renders it unlawful. The arbitration agreement at issue in *Briad Wenco*, supra, also required as much, but that agreement was found lawful based on a sufficiently prominent "savings clause" that preserved employees' rights to file a Board charge or participate in any Board investigation or proceeding. The Respondent's agreement also contains a savings clause, which is not at issue. Nevertheless, for the reasons explained above, we have found that the agreement as currently drafted may not be lawfully maintained.

[10] The Board's policy of deferring to certain labor arbitration decisions is informed by Section 203(d) of the Labor-Management Relations Act, which states that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. §173(d). Here, there is no collective-bargaining agreement to apply or interpret.

[11] In *Babcock & Wilcox* the Board changed the standards under which arbitral decisions are reviewed and shifted the burden of proof from the opponent to the proponent of deferral, overruling *Olin* and *Spielberg*. We are willing to reconsider *Babcock & Wilcox* in a future appropriate case.

[12] The Respondent's observation that particular backpay amounts may be "subject to negotiation" both inside and outside of the Board's processes misses the point. The Respondent's agreement is unlawful because it restricts employees' access to the Board's processes, including Board-ordered monetary remedies, and in doing so, effectively restricts the Board's remedial authority. That negotiation of specific remedial amounts may occur in settlement discussions once the Board's processes have been engaged plainly does not justify precluding employees' full access to those processes.

AMENDED CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that bars or restricts the right of employees to obtain remedies, including backpay where appropriate, from the National Labor Relations Board.
2. The above violation constitutes an unfair labor practice within the meaning of the Act.

ORDER

The Respondent, Kelly Services, Inc., East Brunswick, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that bars or restricts the right of employees to recover backpay or other monetary remedies from the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Dispute Resolution and Mutual Agreement to Binding Arbitration, or revise it to make it clear to employees that the Agreement does not constitute a waiver of their right to recover backpay or other monetary remedies from the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Dispute Resolution and Mutual Agreement to Binding Arbitration in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at all facilities where the Dispute Resolution and Mutual Agreement to Binding Arbitration applies copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility or facilities at any time since September 5, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 12, 2019

_____
John F. Ring, Chairman

_____
Lauren McFerran, Member

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[13] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that bars or restricts your right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise or the rights listed above.

WE WILL rescind the Dispute Resolution and Mutual Agreement to Binding Arbitration, or revise it to make clear to all employees that the agreement does not restrict their right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Dispute Resolution and Mutual Agreement to Binding Arbitration in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

KELLY SERVICES, INC.

The Board's decision can be found at www nlrb.gov/case/04-CA-171036 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Lea Alvo-Sadiky, Esq., for the General Counsel.
Gerald L. Maatman, Jr., Esq. (Seyfarth Shaw LLP), for the Respondent.
Marielle Macher, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was submitted to me by virtue of a joint motion and stipulation pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining as a condition of employment for all employees an arbitration agreement that (1) requires employees to waive their right to maintain class or collective actions in all forums, whether arbitrator or judicial, with respect to their wages, hours or other terms and conditions of employment; and (2) restricts employee access to Board processes by prohibiting employees from receiving back pay or other monetary compensation through Board proceedings. Respondent filed an answer denying the essential allegations in the complaint. All parties filed briefs in support of their positions.[1]

Based on the stipulation and the stipulated record, as well as the briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers. In conducting its operations during the past 12-month period, Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey. At all times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement, and in the record as Joint Exhibit 6*)* which includes, inter alia, the following provisions:

> **1. Agreement to Arbitrate**. Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration instead of going to court, for any "Covered claims that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.
> 2. **Claims Subject to Agreement**. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)
>
> 3. **Exclusions from Agreement**. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, workers' compensation claims, unemployment compensation claims, unfair

[1] The parties agreed that their Stipulation of Facts, with attached exhibits, constitutes the entire record in this case and that no oral testimony is necessary or desired.

competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL") and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. **Waiver of Class and Collective Claims**. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no Arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of class, collective, or representative proceeding.

16. **Savings Clause & Conformity Clause**. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive form for such claims.

All documents attached as exhibits are true and correct copies of the documents described. The parties agree to the authenticity of the exhibits.

STATEMENT OF ISSUES

Based on the above factual stipulations, the parties agree that the legal issues to be resolved in this matter are whether Respondent's maintenance of the Arbitration Agreement described above violates Section 8(a)(1) of the Act because it (i) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment; and (ii) interferes with and restricts employees access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

ANALYSIS

Waiver of Collective Actions

The Board has held that employer rules prohibiting employees, as a condition of employment, from pursuing collective actions in arbitrations or law suits violate Section 8(a)(1) of the Act because they interfere with collective rights set forth in Section 7 of the Act. *D.R. Horton*, *Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (5th Cir. 2013); and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) enf. denied 808 F. 3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017). See also *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted 137 U.S. 809 (2017).

Paragraph 8 of the Arbitration Agreement, which is a condition of employment, clearly precludes employees from pursuing employment-related class or collective actions both in arbitrations and in court proceedings. Thus, the Board's rulings in *D.R. Horton* and *Murphy Oil* require me to find that the Arbitration Agreement violates Section 8(a)(1) of the Act.[2]

Restriction Against Filing Board Charges That Could Provide Monetary Remedies

The Board has held that a mandatory arbitration policy such as the one in this case discussed above also violates Section 8(a)(1) if employees "would reasonably believe that the policy interferes with their ability to file a Board charge or otherwise access the Board's processes." *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. 1 (2016). In that case, the employer argued, as Respondent does here, that another part of the policy provided an adequate defense to the alleged violation because it permitted employees to file charges with the Board. But the Board rejected that defense because, overall, the policy broadly required arbitration for all employment-related disputes, and the reference to filing charges made the policy ambiguous. The Board noted that any ambiguity had to be construed against the promulgator of the policy, particularly because employees reading the policy are lay people, not lawyers able to make sophisticated distinctions such as those set forth in the policy. Thus, in finding a violation, the Board concluded that employees could reasonably read the retention of the right to file Board charges as "illusory." Id. slip op. 2. As the Board further stated (Id. slip op. 3):

> To be meaningful, the right to file charges with the Board must entail the rights to have the Board exercise its statutory powers under Section 10 of the Act: i.e., to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures. An employer may *not* lawfully require individual employees to arbitrate unfair labor

[2] I am bound by existing Board law unless reversed by the Board itself or by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). I am also bound by the Board's rejection, in *Murphy Oil* and *D.R. Horton* of the arguments made in Respondent's brief to me in support of the dismissal of this aspect of the complaint.

practice claims that would otherwise be resolved by the Board under the Act's procedures. To do so necessarily interferes with employee's statutory right of access to the Board.

Ralph's Grocery governs this case. Here, as in *Ralph's Grocery*, the sweep of the broad mandatory arbitration language trumps any preservation of the right to file Board charges. The mandatory arbitration language is set off in bold type, unlike the rest of the policy. The ambiguity in the reading of the broad overall policy by the lay person employees here is the same as it was in *Ralph's Grocery*. Thus, here, as in *Ralph's Grocery*, the Arbitration Agreement's token recognition of the right to file Board charges is "illusory." And the overall Agreement can reasonably be read to inhibit the filing of Board charges. See also *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. 2-3 (2016).

This is an even stronger case for a violation than *Ralph's Grocery*. Paragraph 3 of the Arbitration Agreement permits employees to file Board charges, as it did in *Ralph's Grocery*, but it also explicitly prohibits them from recovering money damages in a Board proceeding, a restriction that was not present in *Ralph's Grocery*. It is difficult to envision how, once the Board's processes have been invoked, the Arbitration Agreement could preclude the Board from exercising its full statutory powers, including its remedial authority. The Board's remedies, of course, often provide for back pay to make employees whole for discrimination and other unfair labor practices found by the Board. Back pay is a specific statutory remedy set forth in Section 10(c) of the Act. Because the Board enforces public, not private, rights, it is doubtful that any private rule could preclude the Board from providing a monetary remedy authorized by a statute of the United States. But the bottom line here is that a reasonable reading of the Arbitration Agreement's prohibition against monetary remedies from the Board is an added inhibition against the filing of charges. Why file a charge in a case where back pay is the normal remedy if you cannot get monetary relief? Accordingly, I find that the Arbitration Agreement precludes full recourse to the Board and thus violates Section 8(a)(1) of the Act in this additional respect.

Although it lists four alleged reasons for the legality of the Arbitration Agreement, Respondent's brief does not provide a persuasive defense to this part of the complaint. All of its reasons run contrary to *Ralph's Grocery*. Its first reason is hard to understand, but, to the extent that it suggests that if "no back pay is sought" in a Board proceeding the Arbitration Agreement is "lawful" (Br. 11-12), it fails to account for the restriction of a full Board remedy in those cases where back pay is a normal remedy. The second reason—that the Agreement allows for the filing of charges (Br. 12-13)—is likewise contrary to the rationale of *Ralph's Grocery* that preservation of the right to file charges is illusory where the thrust of the unlawful policy is to require arbitration in all employment-related disputes. The significance of Respondent's third reason—that denying statutory back pay relief to employees is permissible because back pay is a remedy and not a procedure (Br. 13-14)—escapes me. Respondent seems to allege that because a backpay remedy is not guaranteed its denial to employees who are nevertheless free to file charges does not interfere with Board processes. But, although nothing in life is guaranteed, a backpay remedy is the normal remedy where an appropriate violation is found and circumstances warrant it. Nor is there any distinction in Board jurisprudence that permits access to Board processes and exclusion of Board remedies where appropriate. This is made clear by the Board's language in *Ralph's Grocery,* set forth above, that access to Board processes includes the right to "pursue appropriate relief" through the Board. A backpay remedy is thus part of Board processes. Respondent final reason—that because deferral to arbitration is permitted in some circumstances, it should be permitted here (Br. 14-19) is without merit. As the Board made clear in *Ralph's Grocery*, deferral to arbitration is a discretionary policy of the Board that has been used only when the arbitration provision has been the result of a collectively bargained agreement, which is not the case here. 363 NLRB No. 128, slip op. 3.

CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that employees reasonably would believe bars or restricts their right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

3. The above violations constitute unfair labor practices within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and deist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. As I have concluded that the Arbitration Agreement is unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Kelly Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing a mandatory arbitration policy that waives the right of employees to maintain class or collective actions in all forms, whether arbitral or judicial.

(b) Maintaining or enforcing a mandatory arbitration policy that employees reasonably would believe bars or restricts the right of employees to file charges and seek remedies, including

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

backpay where appropriate, before the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, or to file charges and seek remedies, including backpay where appropriate, before the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised Arbitration Agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at all facilities where the Dispute Resolution and Mutual Agreement to Binding Arbitration applied copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 23, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mandatory arbitration policy that waives your right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory arbitration policy that you reasonably could believe bars or restricts your right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise or the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the Dispute Resolution and Mutual Agreement to Binding Arbitration to make it clear to all employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict their right to file charges and seek remedies including back pay where appropriate, before the National Labor Relations Board.

WE WILL notify all employees of the rescinded or revised Dispute Resolution and Mutual Agreement to Binding Arbitration, and WE WILL provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

KELLY SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-142795 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FORM NLRB 4728 (10-13)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

APPENDIX A

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that bars or restricts your right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise or the rights listed above.

WE WILL rescind the Dispute Resolution and Mutual Agreement to Binding Arbitration or revise it to make clear to all employees that the agreement does not restrict their right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Dispute Resolution and Mutual Agreement to Binding Arbitration in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement

KELLY SERVICES, INC._____
(EMPLOYER)

Dated: _____ By: _____
REPRESENTATIVE TITLE

The Board's decision can be found at www.nlrb.gov/case/04-CA-171036 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov and the toll-free number (844) 762-NLRB (6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer,

NLRB, 100 E. Penn Square, Suite 403, Philadelphia, PA 19107
(Telephone: 215-597-7601; Facsimile: 215-597-7658),
(Hours of Operation: 8:30 a.m. to 5:00 p.m.)
Case 4-CA-171036

CERTIFICATION OF COMPLIANCE
(PART ONE)

RE: Kelly Services, Inc.
Case 04-CA-171036

(If additional space is needed to provide a full response, attach a sheet(s) with the necessary information.)

As required by the Board's Order in this matter, this document is a sworn certification of the steps that Respondent has taken to comply with the Board's order.

Physical Posting

The signed and dated Notice to Employees in the above matter was posted on (date) 2/24/2020 at the following locations: (List specific places of posting)
Please see attached list.

A copy of the signed Notice is attached.

Intranet Posting

The signed and dated Notice to Employees in the above matter was posted on the Respondent's intranet/website on (date) 2/24/2020. A copy of the intranet/website posting is attached.

Electronic Mailing - Respondent is still working on this and will follow-up when completed.

The signed and dated Notice to Employees in the above-captioned matter was e-mailed on (date)_____ to all current employee. A copy of the list of names and addresses of employees to whom the Notices were e-mailed is attached. The electronic mailing transmitting the Notice to Employees was sent to the undersigned Compliance Officer on _____.

I have completed this Certification of Compliance, Part One and state under penalty of perjury that it is true and correct.

RESPONDENT

By: [signature]

Title: VP, Chief Litigation / Employment law Counsel

Date: 3/10/2020

This form should be returned to the Compliance Officer via e-file.

Kelly Services, Inc.
Case No. 04-CA-171036

Physical Posting Locations

Kelly Services, Inc.	11601 Wilshire Blvd,	Suite #500	Los Angeles, CA 90025-1741
Kelly Services, Inc.	1624 Santa Clara Dr	Ste 160	Roseville, CA 95661-3500
Kelly Services, Inc.	130 River Landing Dr.	Unit 1-D	Charleston, SC 29492-7440
Kelly Services, Inc.	2690 Crooks Road		Troy, MI 48084
Kelly Services, Inc.	295 Kirts Blvd.		Troy, MI 48084
Kelly Services, Inc.	1890 Preston White Drive	Suite 150	Reston, VA 20191
Kelly Services, Inc.	300 South Wacker Drive	Suite 1313	Chicago, IL 60606
Kelly Services, Inc.	401 West "A" Street		San Diego, CA 92101
Kelly Services, Inc.	911 W. Big Beaver Road		Troy, MI 48084
Kelly Services, Inc.	999 West Big Beaver Road		Troy, MI 48084
Kelly Services, Inc.	2204 Lakeshore Dr	Ste 105	Homewood, AL 35209-6729
Kelly Services, Inc.	2132 McFarland	Ste. D	East Tuscaloosa, AL 35404 5863
Kelly Services, Inc.	3160 W Main St.	Ste 4	Dothan, AL 36301-1180
Kelly Services, Inc.	2222 Chisholm Road		Florence, AL 36530
Kelly Services, Inc.	6241 University Dr	Ste B-1	Huntsville, AL 35805-1711

Kelly Services, Inc.	4142-B Carmichael Rd.		Montgomery, AL 36106-2934
Kelly Services, Inc.	2200-C Gateway Dr	C	Opelika, AL 36801 4313
Kelly Services, Inc.	104 B Executive Prk Ln.		Selma, AL 36701-7753
Kelly Services, Inc.	1994 US Hwy 78 E		Oxford, AL 36203-2020
Kelly Services, Inc.	4730 Business Park Blvd.	Ste 101	Anchorage, AK 99503-7137
Kelly Services, Inc.	5210 E. Williams Circle	Ste 130	Tucson, AZ 85711-4497
Kelly Services, Inc.	960 W. Elliott Rd.,	Ste. 201	Tempe, AZ 85284-1145
Kelly Services, Inc.	10320 W. McDowell Rd.	Blg. N, Ste 1446	Avondale, AZ 85392-4879
Kelly Services, Inc.	1001 S. Bowman St.	Ste 2	Little Rock, AR 72211-3708
Kelly Services, Inc.	3606 W. Southern Hills Blvd.	Ste 104	Rogers, AR 72758-8013
Kelly Services, Inc.	1102 S. Pine	Suite #4	Cabot, AR 72023
Kelly Services, Inc.	4301 Regions Park Dr	Ste. 1A	Fort Smith, AR 72903-2681
Kelly Services, Inc.	790 The City Drive	Ste. 150	Orange, CA 92868-4977
Kelly Services, Inc.	1510 Fashion Island Blvd.	Ste 370	San Mateo, CA 94404-5068
Kelly Services, Inc.	5990 Stoneridge Dr	Ste 106	Pleasanton, CA 94588-3234
Kelly Services, Inc.	3031 West March Lane	Ste 134 S.	Stockton, CA 95219-6578

Kelly Services, Inc.	1101 Sylvan Ave	Ste A21	Modesto, CA 95350-1688
Kelly Services, Inc.	1889 N. Rice Avenue	Ste. 205	Oxnard, CA 93030-7989
Kelly Services, Inc.	14724 Ventura Blvd	Ste 710	Sherman Oaks, CA 91403-3500
Kelly Services, Inc.	3350 Shelby Street	Suite 125	Ontario, CA 91764
Kelly Services, Inc.	1000 Lakes Dr.	Ste 140	West Covina, CA 91790-2921
Kelly Services, Inc.	3550 Vine Street	Ste 100	Riverside, CA 92507-4175
Kelly Services, Inc.	2121 41st Ave	Ste 305	Capitola, CA 95010-2058
Kelly Services, Inc.	191 San Felipe Rd	Ste H	Hollister, CA 95023-3065
Kelly Services, Inc.	1418 South Main St.	Ste. 102	Salinas, CA 93908-8834
Kelly Services, Inc.	2025 Gateway Pl	Ste 120	San Jose, CA 95110-1005
Kelly Services, Inc.	5000 E Spring Street	Ste 430	Long Beach, CA 90815-1547
Kelly Services, Inc.	11010 White Rock Road	Ste 100	Rancho Cordova, CA 95670-6362
Kelly Services, Inc.	2275 Rio Bonito Way	Ste 210	San Diego, CA 92108
Kelly Services, Inc.	3223 Arapahoe Ave	Ste 102	Boulder, CO 80303-1097
Kelly Services, Inc.	2580 East Harmony Raod	Team Office 1	Fort Collins, CO 80528-9630
Kelly Services, Inc.	1720 S. Bellaire Street	Ste. 405	Denver, CO 80222

Kelly Services, Inc.	76 Batterson Park Rd	Ste 3	Farmington, CT 06032-2589
Kelly Services, Inc.	155 Hazard Avenue	Ste 7	Enfield, CT 06082-4586
Kelly Services, Inc.	8 Church St		Torrington, CT 06790-5247
Kelly Services, Inc.	67 Federal Road		Brookfield, CT 06804-2538
Kelly Services, Inc.	5 Shaw's Cove	Ste102	New London, CT 06320-4974
Kelly Services, Inc.	2313 Whitney Ave	Ste I-C	Hamden, CT 06518-3539
Kelly Services, Inc.	101 Merritt	3rd Flr	Norwalk, CT 06851-1059
Kelly Services, Inc.	34 Reads Way	Unit 34	New Castle, DE 19720-1649
Kelly Services, Inc.	160 Greentree Dr	Ste 103	Dover, DE 19904-7620
Kelly Services, Inc.	4631 Woodland Corporate Blvd	Ste 117	Tampa, FL 33614-2416
Kelly Services, Inc.	15050 N.W. 79 Court	Ste 102	Miami Lakes, FL 33014-2048
Kelly Services, Inc.	13575 58th St N	#182	Clearwater, FL 33760-3721
Kelly Services, Inc.	1476 Town Center Drive	Ste 223	Lakeland, FL 33803-7971
Kelly Services, Inc.	5545 N. Wickham Road	Ste 109	Melbourne, FL 32940-7323
Kelly Services, Inc.	5210 Belfort Road	Suite 140	Jacksonville, FL 32256
Kelly Services, Inc.	1891 Capital Circle NE	Ste 12	Tallahassee, FL 32308-4486

Kelly Services, Inc.	3036 University Pky		Sarasota, FL 34243-2502
Kelly Services, Inc.	5401 Corporate Woods Drive	Suite 200	Pensacola, FL 32504-5910
Kelly Services, Inc.	1500 Freedom Self Storage Rd	Unit 4	Ft. Walton Beach, FL 32547-8900
Kelly Services, Inc.	6611 Orion Drive	Ste 102	Fort Myers, FL 33912-4329
Kelly Services, Inc.	2210 NW 40th Ter	Ste B	Gainesville, FL 32605-3589
Kelly Services, Inc.	7556 Municipal Dr		Orlando, FL 32819-8932
Kelly Services, Inc.	3319 Maguire Boulevard	Ste 150	Orlando, FL 32803-3725
Kelly Services, Inc.	151 College Drive	Ste 8 & 9	Orange Park, FL 32065-7684
Kelly Services, Inc.	5550 Idlewild Avenue	Ste 101	Tampa, FL 33634-8014
Kelly Services, Inc.	6600 Peachtree Dunwoody Rd, Ste 110	600 Embassy Row	Atlanta, GA 30328-6773
Kelly Services, Inc.	875 Flat Shoals Rd SE	Ste 155	Conyers, GA 30094-6640
Kelly Services, Inc.	1450 Greene Street	Ste 150	Augusta, GA 30901-5240
Kelly Services, Inc.	2813 Old Dawson Road		Albany, GA 31707-1513
Kelly Services, Inc.	3190 Atlanta Highway	Ste 23	Athens, GA 30606-6971
Kelly Services, Inc.	3 E 6th Ave		Rome, GA 30161-6001

Kelly Services, Inc.	844 Gordon Street		Jefferson, GA 30549-6825
Kelly Services, Inc.	5650 Whitesville Road	Ste 102	Columbus, GA 31904-3450
Kelly Services, Inc.	10 Chatham Center South	Ste 300	Savannah, GA 31405-7426
Kelly Services, Inc.	380 South Davis Road	Ste B	La Grange, GA 30241-2588
Kelly Services, Inc.	677 Ala Moana Boulevard	Ste 401	Honolulu, HI 96813-5419
Kelly Services, Inc.	West Valley Business Center	9482 W Fairview Ave	Boise, ID 83704-8108
Kelly Services, Inc.	5301 East State Street	Ste 215D	Rockford, IL 61108 2901
Kelly Services, Inc.	310 7th St	Suite 101	Rockford, IL 61104
Kelly Services, Inc.	55 West Monroe St	Ste 1905	Chicago, IL 60603-5001
Kelly Services, Inc.	1375 E. Woodfield	110	Schaumburg, IL 60173-6068
Kelly Services, Inc.	20214 S. La Grange Rd.		Frankfort, IL 60423-1338
Kelly Services, Inc.	675 Main St. NW		Bourbonnais, IL 60914-2303
Kelly Services, Inc.	3718 N. Prospect Rd		Peoria, IL 61614-7743
Kelly Services, Inc.	3001 Montvale Dr	Ste B	Springfield, IL 62704-5361
Kelly Services, Inc.	113 N Mattis Ave	Ste K	Champaign, IL 61821-3054
Kelly Services, Inc.	460 B N Weber Rd.		Romeoville, IL 60446-5366

Kelly Services, Inc.	1815 S. Meyers Rd.		Oakbrook Terrace, IL 60181-5203
Kelly Services, Inc.	1815 S. Meyers Rd.		Oakbrook Terrace, IL 60181-5203
Kelly Services, Inc.	303 Hershey Street	Ste D-3	Bloomington, IL 61704-3476
Kelly Services, Inc.	2150 E. Lake Cook Rd	Ste 45C	Buffalo Grove, IL 600891862
Kelly Services, Inc.	608 W. Kirkham St		Litchfield, IL 62056-2632
Kelly Services, Inc.	450 N. Route 31	110	Crystal Lake, IL 60012 3763
Kelly Services, Inc.	1279 N. Emerson Avenue	A2	Greenwood, IN 46143 6674
Kelly Services, Inc.	6010 West 86th Street	Ste 120	Indianapolis, IN 46278 1407
Kelly Services, Inc.	6319D Mutual Drive	ste D	Fort Wayne, IN 46825 4246
Kelly Services, Inc.	5750 Castle Creek Pkwy	Ste. 187	Indianapolis, IN 46250-4338
Kelly Services, Inc.	925 Wabash	150	Terre Haute, IN 47807 3236
Kelly Services, Inc.	3626 Grant Line Rd.	Ste 203	New Albany, IN 47150-2298
Kelly Services, Inc.	2146 N. Karwick Rd.	Ste E	Michigan City, IN 46360-2197
Kelly Services, Inc.	810 Brown St	Ste B	Columbus, IN 47201-6212
Kelly Services, Inc.	620 Greensburg Commons Shopping Center 11		Greensburg, IN 47240

Kelly Services, Inc.	900 Tutor Lane	Ste 103	Evansville, IN 47630-7295
Kelly Services, Inc.	3725 86th Street		Urbandale, IA 50322-4008
Kelly Services, Inc.	2533 East 53rd Street	Ste 2	Davenport, IA 52807-3021
Kelly Services, Inc.	1120 Depot Ln SE		Cedar Rapids, IA 52401
Kelly Services, Inc.	28 Sturgis Corner Dr		Iowa City, IA 52246-5617
Kelly Services, Inc.	Colony Shoppes	1107 Indian Mound Dr, Ste B	Mt. Sterling, KY 40353-1300
Kelly Services, Inc.	9100 Shelbyville Rd	Ste 140	Louisville, KY 40222-5153
Kelly Services, Inc.	17 Village Plaza		Shelbyville, KY 40065 1745
Kelly Services, Inc.	2130 Lexington Rd	Ste B	Richmond, KY 40475-7923
Kelly Services, Inc.	7300 Turfway Rd	Ste 140	Florence, KY 41042-1398
Kelly Services, Inc.	1118 South Main Street	Ste 2	Morgantown, KY 42261 9409
Kelly Services, Inc.	2358 Nicholasville Rd	Ste 165	Lexington, KY 40503 3041
Kelly Services, Inc.	1515 Poydras St	Ste 2280	New Orleans, LA 70112-3723
Kelly Services, Inc.	3888 S. Sherwood Forest Blvd.	Bldg. 6, Ste R	Baton Rouge, LA 70816-4400
Kelly Services, Inc.	7330 Fern Ave	Ste 302	Shreveport, LA 71105-4971
Kelly Services, Inc.	3133 Mercedes Dr		Monroe, LA 71201-5153

Kelly Services, Inc.	48 Atlantic Pl	Ste B-48	South Portland, ME 04106-2316
Kelly Services, Inc.	1120 Center St		Auburn, ME 04210
Kelly Services, Inc.	3600 Clipper Road	Suite 211-212	Baltimore, MD 21211
Kelly Services, Inc.	6101 Executive Boulevard	Suite 290	Rockville, MD 20852
Kelly Services, Inc.	8380 Colesville Road	Ste 500	Silver Spring, MD 20910-6261
Kelly Services, Inc.	99 Chauncy St	Ste 110	Boston, MA 02111-1735
Kelly Services, Inc.	425 Washington Street		Stoughton, MA 02072-4210
Kelly Services, Inc.	58D Apex Drive		Marlborough, MA 01752
Kelly Services, Inc.	3031 W. Grand Blvd	160	Detroit, MI 48202
Kelly Services, Inc.	2750 S. State Street	2	Ann Arbor, MI 48104 6179
Kelly Services, Inc.	22030 Eureka Rd		Taylor, MI 48180-5233
Kelly Services, Inc.	525 South Washington		Royal Oak, MI 48067
Kelly Services, Inc.	508 E Grand River Ave	Ste 300	Brighton, MI 48116-1817
Kelly Services, Inc.	4805 Town Centre	Ste 104	Saginaw, MI 48604 2831
Kelly Services, Inc.	951 S Main St	Ste 1	Lapeer, MI 48446-4128
Kelly Services, Inc.	2425 S Linden Rd	Ste A	Flint, MI 48532-5474
Kelly Services, Inc.	5144 Sprinkle Road		Portage, MI 49002-2055

Kelly Services, Inc.	142 Ashman St		Midland, MI 48640-5138
Kelly Services, Inc.	1147 US 31 N		Petoskey, MI 49770-9305
Kelly Services, Inc.	4 Parklane Blvd	Ste 475	Dearborn, MI 48126 4259
Kelly Services, Inc.	1028 Trowbridge Road		East Lansing, MI 48823
Kelly Services, Inc.	2055 28th Street SE		Grand Rapids, MI 49508
Kelly Services, Inc.	AmeriCenters	26677 W. 12 Mile Rd., Ste 107	Southfield, MI 48034-1514
Kelly Services, Inc.	3900 N Woods Dr	Ste 100	Arden Hills, MN 55112-6966
Kelly Services, Inc.	1650 W 82nd St	Ste 750	Bloomington, MN 55431-1474
Kelly Services, Inc.	4150 S Second St.	Ste 425	St. Cloud, MN 56301-7314
Kelly Services, Inc.	3505 Vicksburg Ln	Ste 800	Plymouth, MN 55447-1352
Kelly Services, Inc.	3001 Metro Drive		Bloomington, MN 55425
Kelly Services, Inc.	444 Cedar St	Ste 206	St. Paul, MN 55101-2187
Kelly Services, Inc.	Medical Arts Bldg	324 W. Superior St., Ste. 20	Duluth, MN 55802-1701
Kelly Services, Inc.	Lakeport Shopping Ctr	4211 Lakeland Dr	Flowood, MS 39232-9212
Kelly Services, Inc.	2307 12th Street		Meridian, MS 39301-3934
Kelly Services, Inc.	15118 Crossroads Parkway	15106	Gulfport, MS 39503-3565

Kelly Services, Inc.	8110 Camp Creek Blvd.		Olive Branch, MS 38654-1614
Kelly Services, Inc.	9200 Indian Creek Pky	Ste 130	Overland Park, KS 66210-2008
Kelly Services, Inc.	237 Northwest Blue Pky	Ste 200	Lee's Summit, MO 64063-1888
Kelly Services, Inc.	2458 Old Dorsett Rd	Ste 321	Maryland Heights, MO 63043-2422
Kelly Services, Inc.	915 SW Blvd.	Ste C	Jefferson City, MO 65109-5014
Kelly Services, Inc.	1000 W. Nifong	Ste 8-110	Columbia, MO 65203-5615
Kelly Services, Inc.	5506 Corporate Drive	Ste 1740	Saint Joseph, MO 64507-7764
Kelly Services, Inc.	2833 E. Battlefield	Ste A-100	Springfield, MO 65804-4192
Kelly Services, Inc.	2060 Overland Ave	Ste B	Billings, MT 59102-6439
Kelly Services, Inc.	12020 Shamrock Plaza	110	Omaha, NE 68154-3537
Kelly Services, Inc.	6940 O Street	Suite #308	Lincoln, NE 68501-2458
Kelly Services, Inc.	3110 S. Durango Dr	Ste 204	Las Vegas, NV 89117-9198
Kelly Services, Inc.	6543 South Las Vegas Boulevard	Suite 200	Las Vegas, NV 89119
Kelly Services, Inc.	Moana Market Place	3600 Warren Way, Ste 103	Reno, NV 89509-5397
Kelly Services, Inc.	896 W. Nye Lane	Ste 101	Carson City, NV 89703-1567
Kelly Services, Inc.	750 Lafayette Road	Ste 104	Portsmouth, NH 03801-6040

Kelly Services, Inc.	6 Bedford Farms Dr	Ste 613	Bedford, NH 03110-6532
Kelly Services, Inc.	523 Hollywood Avenue		Cherry Hill, NJ 08002
Kelly Services, Inc.	1099 Wall Street West	Ste 139	Lyndhurst, NJ 07071-3617
Kelly Services, Inc.	100 Franklin Sq Dr	Ste 103	Somerset, NJ 08873-4109
Kelly Services, Inc.	535 Route 38	Ste 120	Cherry Hill, NJ 08002-2953
Kelly Services, Inc.	2001 Route 46	Ste 101	Parsippany, NJ 07054-1315
Kelly Services, Inc.	100 Overlook Center	Ste 200	Princeton, NJ 08540-7814
Kelly Services, Inc.	6000 Uptown Blvd NE		Albuquerque, NM 87110-4157
Kelly Services, Inc.	125 Wolf Road	Ste 403	Albany, NY 12205-1221
Kelly Services, Inc.	1250 Vestal Parkway East		Vestal, NY 13850-1835
Kelly Services, Inc.	55 Ferris Street	Ste 201	Corning, NY 14830 2242
Kelly Services, Inc.	500 Corporate Pkwy	Ste 116	Amherst, NY 14226-1263
Kelly Services, Inc.	300 E Second Street		Jamestown, NY 14702
Kelly Services, Inc.	400 Meridian Centre Blvd	Ste 300	Rochester, NY 14619-3991
Kelly Services, Inc.	3225 State Route 364	Ste 45	Canandaigua, NY 14424-2352
Kelly Services, Inc.	990 James St	Ste 201	Syracuse, NY 13203-2879

Kelly Services, Inc.	15 Dill St		Auburn, NY 13021-3605
Kelly Services, Inc.	45 Genesee Street		Auburn, NY 13021
Kelly Services, Inc.	214 Oriskany Blvd		Whitesboro, NY 13492
Kelly Services, Inc.	425 Broad Hollow Rd	Ste 126	Melville, NY 11747-4700
Kelly Services, Inc.	102 S. Main St		Newark, NY 14513-1419
Kelly Services, Inc.	99 Park Ave		New York, NY 10016-1614
Kelly Services, Inc.	110 W Main St		Le Roy, NY 14482-1362
Kelly Services, Inc.	11020 David Taylor Dr	Ste 200	Charlotte, NC 28262-1103
Kelly Services, Inc.	600 Towne Centre Blvd		Pineville, NC 28134
Kelly Services, Inc.	1950 Hendersonville Rd	Ste 6	Asheville, NC 28803-2193
Kelly Services, Inc.	One Copley Parkway	Ste 302	Morrisville, NC 27560-9693
Kelly Services, Inc.	3041 Boone Trail		Fayetteville, NC 28304
Kelly Services, Inc.	613 Sullivan Rd		Statesville, NC 28677-3437
Kelly Services, Inc.	4194 Mendenhall Oaks Parkway	Ste 120	High Point, NC 27265-8341
Kelly Services, Inc.	1701 Sunset Avenue	Ste 102	Rocky Mount, NC 27804-4350
Kelly Services, Inc.	1921 Bragg Street		Sanford, NC 27330-5854

Kelly Services, Inc.	1917 & 1919 S. Hwy. 119		Mebane, NC 27302
Kelly Services, Inc.	205 Plaza Drive	Suite C	Greenville, NC 27858-6752
Kelly Services, Inc.	4501 15th Ave SW	Ste 102	Fargo, ND 58103-8956
Kelly Services, Inc.	3750 32nd Ave. S	Ste 101	Grand Forks, ND 58201-5998
Kelly Services, Inc.	6155 Rockside Rd	Ste 304	Independence, OH 44131-2217
Kelly Services, Inc.	49 Briggs Drive		Ontario, OH 44906
Kelly Services, Inc.	2306 Harding Highway		Lima, OH 45804
Kelly Services, Inc.	1750 W. Michigan Street		Sidney, OH 45365
Kelly Services, Inc.	3655 Michigan Ave		Cincinnati, OH 45208-1411
Kelly Services, Inc.	5212 Detroit Road		Sheffield Village, OH 44035-1439
Kelly Services, Inc.	3055 Kettering Blvd	Ste 201	Moraine, OH 45439-1989
Kelly Services, Inc.	429 West Dussel Drive		Maumee, OH 43537 4208
Kelly Services, Inc.	639 Wagner Ave.	Ste D	Greenville, OH 45331-2635
Kelly Services, Inc.	970 Windham Ct	1B	Boardman, OH 44512-5082
Kelly Services, Inc.	855 W. Main St.	Suite H	Bellevue, OH 44811 9078
Kelly Services, Inc.	2767 Martin Rd		Dublin, OH 43017-2096

Kelly Services, Inc.	6968 E Broad St	Ste 7	Columbus, OH 43213-1517
Kelly Services, Inc.	4013 Northwest Exp	Ste 260	Oklahoma City, OK 73116-2610
Kelly Services, Inc.	7134 S. Yale	Suite 150	Tulsa, OK 74136-6377
Kelly Services, Inc.	713 N. Commerce Street		Ardmore, OK 43401
Kelly Services, Inc.	650 N.E. Holladay Street	Ste 125	Portland, OR 97204
Kelly Services, Inc.	1600 Valley River Drive	Ste 170	Eugene, OR 97401 2191
Kelly Services, Inc.	10300 SW Greenburg Rd	Ste 220	Portland, OR 97223-5524
Kelly Services, Inc.	19 Brookwood Avenue	Ste 103	Carlisle, PA 17015-9142
Kelly Services, Inc.	5100 Tilghman Street	Ste 200	Allentown, PA 18104-9166
Kelly Services, Inc.	4125 W Ridge Rd	Ste A	Erie, PA 16506-1763
Kelly Services, Inc.	16285 Conneault Road	Ste 100	Meadville, PA 16335-3845
Kelly Services, Inc.	200 Yale Avenue		Morton, PA 19070
Kelly Services, Inc.	1400 Eisenhower Blvd	Ste 102	Johnstown, PA 15904-3257
Kelly Services, Inc.	150 Allendale Road	Ste. 3203	King of Prussia, PA 19406
Kelly Services, Inc.	2005 Market Street	Ste 1920A	Philadelphia, PA 19103-7042
Kelly Services, Inc.	7300 Bustleton Avenue	Ste 215	Philadelphia, PA 19152-4300

Kelly Services, Inc.	436 7th Ave	Ste 228	Pittsburgh, PA 15219-1818
Kelly Services, Inc.	124 CenterPoint Blvd.		Pittston, PA 18640-6133
Kelly Services, Inc.	1000 Cliff Mine Road	Ste 390	Pittsburgh, PA 15275
Kelly Services, Inc.	300 Granite Run Drive	Ste 100	Lancaster, PA 17601-6819
Kelly Services, Inc.	2701 Eastern Blvd	Ste C	York, PA 17402-2907
Kelly Services, Inc.	90 Commerce Drive		Wyomissing, PA 19610
Kelly Services, Inc.	330 West Oregon Avenue	Ste J	Philadelphia, PA 19148-4723
Kelly Services, Inc.	440 North Broad Street	Ste 1173	Philadelphia, PA 19130-4015
Kelly Services, Inc.	26 Briarcrest Square		Hershey, PA 17033-2359
Kelly Services, Inc.	95 Sockanosset Crossroad	Ste 101	Cranston, RI 02920-5559
Kelly Services, Inc.	1620 Farrow Pkwy	Unit A-3	Myrtle Beach, SC 29577-2012
Kelly Services, Inc.	1435 Riverchase Blvd	Ste 101	Rock Hill, SC 29732-1958
Kelly Services, Inc.	Converse Building	250 Berry Hill Rd, Ste 101	Columbia, SC 29210-6469
Kelly Services, Inc.	5900 Core Avenue	Ste 400	North Charleston, SC 29406-6069
Kelly Services, Inc.	492 Garlington Road		Greenville, SC 29615-4615
Kelly Services, Inc.	446 Second Loop Road		Florence, SC 29505-2814

Kelly Services, Inc.	448 2nd Loop Rd		Florence, SC 29505-2814
Kelly Services, Inc.	5107 West 41st St	Ste 3	Sioux Falls, SD 57106 1463
Kelly Services, Inc.	1301 Omaha St	Ste 107	Rapid City, SD 57701-2421
Kelly Services, Inc.	6076 Shallowford Road	Ste 101	Chattanooga, TN 37421-1611
Kelly Services, Inc.	10307 Kingston Pike		Knoxville, TN 37922-3224
Kelly Services, Inc.	2241 Sandstone Drive		Morristown, TN 37725
Kelly Services, Inc.	1769 Paragon	Ste 112	Memphis, TN 38132 1705
Kelly Services, Inc.	402 BNA Drive	Ste 610	Nashville, TN 37217-2517
Kelly Services, Inc.	1915 Snapps Ferry Rd	Bldg M	Greeneville, TN 37745-3509
Kelly Services, Inc.	113 Cherry Street	Ste 40	Johnson City, TN 37604-6974
Kelly Services, Inc.	1081 Vann Dr	Ste 101	Jackson, TN 38305-6049
Kelly Services, Inc.	7301 State Hwy 161	Ste 170	Irving, TX 75039-2812
Kelly Services, Inc.	7102 I-40 W		Amarillo, TX 79106-2503
Kelly Services, Inc.	700 Highlander Blvd	Ste 230	Arlington, TX 76015-4300
Kelly Services, Inc.	3549 Grapevine Mills Parkway		Grapevine, TX 76051
Kelly Services, Inc.	11757 Katy Fwy	Ste 1240	Houston, TX 77079-1730

Kelly Services, Inc.	919 Milam St	Ste 1920	Houston, TX 77002-5362
Kelly Services, Inc.	350 Pine St	Ste 205	Beaumont, TX 77701-2425
Kelly Services, Inc.	12727 Featherwood Dr	Ste 106	Houston, TX 77034-4908
Kelly Services, Inc.	4601 50th St	Ste 100	Lubbock, TX 79414-3514
Kelly Services, Inc.	6 Desta Dr	Ste 1260	Midland, TX 79705-5510
Kelly Services, Inc.	Union Square	10101 Reunion Place,	San Antonio, TX 78216-4104
Kelly Services, Inc.	333 North Sam Houston Parkway East	Ste 125	Houston, TX 77060-2498
Kelly Services, Inc.	122 West Way	Ste 400	Lake Jackson, TX 77566-5223
Kelly Services, Inc.	400 Austin Avenue	Ste 201	Waco, TX 76701-2138
Kelly Services, Inc.	4400 Buffalo Gap Rd	Ste 3700	Abilene, TX 79606-8727
Kelly Services, Inc.	10737 Gateway West	Ste 200	El Paso, TX 79935-4919
Kelly Services, Inc.	2715 Traders Rd	Ste F	Greenville, TX 75402-8343
Kelly Services, Inc.	6836 Austin Center Blvd	Ste 250	Austin, TX 78731-3193
Kelly Services, Inc.	1313 N. Travis Street	Ste 103	Sherman, TX 75090-5165
Kelly Services, Inc.	1425 N Dallas Avenue	Ste 104	Lancaster, TX 75134-3247
Kelly Services, Inc.	6400 N 10th Street		McAllen, TX 78501

Kelly Services, Inc.	2200 E Trenton	Ste 4B	McAllen, TX 78504-6355
Kelly Services, Inc.	3608 E 29th St	Ste 109	Bryan, TX 77802-3814
Kelly Services, Inc.	102 Commander Drive		Longview, TX 75605
Kelly Services, Inc.	1828 E Southeast Loop 323	Ste 109	Tyler, TX 75701-8314
Kelly Services, Inc.	709 E. Calton Rd	Ste 104	Laredo, TX 78041-3664
Kelly Services, Inc.	5000 Legacy Dr.	Ste 100	Plano, TX 75024-3112
Kelly Services, Inc.	181 E 5600 S	Ste 140	Murray, UT 84107-6126
Kelly Services, Inc.	2255 N University Pkwy	Ste 7	Provo, UT 84604-7517
Kelly Services, Inc.	1300 N 200 E	Ste 112	Logan, UT 84341-2460
Kelly Services, Inc.	2401 Kiesel Avenue		Ogden, UT 84401-2306
Kelly Services, Inc.	558 E Riverside Dr	Ste 204	St. George, UT 84790-7173
Kelly Services, Inc.	54 West Twin Oaks Ter	Ste 15	South Burlington, VT 05403-7138
Kelly Services, Inc.	271 N. Main Street	Ste 206	Rutland, VT 05701 2424
Kelly Services, Inc.	28 Weems Ln		Winchester, VA 22601-3602
Kelly Services, Inc.	813 Diligence Dr	Ste 121D	Newport News, VA 23606-4284
Kelly Services, Inc.	7443 Lee Davis Road	Suite 100	Mechanicsville, VA 23111

Kelly Services, Inc.	4355 Starkey Rd	Ste 8	Roanoke, VA 24014-0610
Kelly Services, Inc.	175 Community Street		Charlottesville, VA 22911-5602
Kelly Services, Inc.	2035 E. Market Street	Unit 012	Harrisonburg, VA 22801-8880
Kelly Services, Inc.	20347 Timberlake Rd	Ste A	Lynchburg, VA 24502-7352
Kelly Services, Inc.	950 Herndon Pkwy	Ste 150	Herndon, VA 20170-5546
Kelly Services, Inc.	20829 72nd Ave S.	Ste 530	Kent, WA 98032-1404
Kelly Services, Inc.	728 134th St SW	Ste 201	Everett, WA 98204-5322
Kelly Services, Inc.	201 West North River Drive	Ste 210	Spokane, WA 99201-0877
Kelly Services, Inc.	15325 SE 30th Pl	Ste 300	Bellevue, WA 98007-6538
Kelly Services, Inc.	2219 Rimland	Ste 411	Bellingham, WA 98226-8660
Kelly Services, Inc.	5707 MacCorkle Ave SE	Ste 385	Charleston, WV 25304-2816
Kelly Services, Inc.	3135 16th Street	Ste 12	Huntington, WV 25701-5247
Kelly Services, Inc.	520 Grand Central	Ste 202	Vienna, WV 26105-2169
Kelly Services, Inc.	8 Mountain Park Dr		White Hall, WV 26554-8992
Kelly Services, Inc.	135 S. 84th Street		Milwaukee, WI 53214 1477
Kelly Services, Inc.	1551 Park Pl	Ste 200	Ashwaubenon, WI 54304-1969

Kelly Services, Inc.	1101 Brilowski Rd	Ste D	Stevens Point, WI 54481-8479
Kelly Services, Inc.	103 West McMillan Street	L-1	Marshfield, WI 54449
Kelly Services, Inc.	4335 E Towne Way		Madison, WI 53704-3707
Kelly Services, Inc.	2004 Highland Avenue		Eau Claire, WI 54701 4346
Kelly Services, Inc.	4737 W Michaels Dr		Appleton, WI 54913-8424
Kelly Services, Inc.	340 Midland Rd	Ste 140	Janesville, WI 53546-2339
Kelly Services, Inc.	10351 Washington		Racine, WI 53177
Kelly Services, Inc.	605 S 24th Ave	Ste 36	Wausau, WI 54401-1705
Kelly Services, Inc.	753 E Perkins St		Medford, WI 54451-1916
Kelly Services, Inc.	11950 W Lake Park Dr	Ste 105	Milwaukee, WI 53224-3036
Kelly Services, Inc.	4020 S. Poplar St		Casper, WY 82601
Kelly Services, Inc.	B7 Tabonuco Street	Ste 1501	Guaynabo, PR 00968-3028
Kelly Services, Inc.	30 Padial Street	Ste 108	Caguas, PR 00725-3807

FORM NLRB 4728 (10-13)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

APPENDIX A

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that bars or restricts your right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise or the rights listed above.

WE WILL rescind the Dispute Resolution and Mutual Agreement to Binding Arbitration or revise it to make clear to all employees that the agreement does not restrict their right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Dispute Resolution and Mutual Agreement to Binding Arbitration in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement

KELLY SERVICES, INC.
(EMPLOYER)

Dated: FEB 0 5 2020

By: VP, Chief Litigation & Employment Law Counsel
REPRESENTATIVE TITLE

The Board's decision can be found at www.nlrb.gov/case/04-CA-171036 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov and the toll-free number (844) 762-NLRB (6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer,

NLRB, 100 E. Penn Square, Suite 403, Philadelphia, PA 19107
(Telephone: 215-597-7601; Facsimile: 215-597-7658,
(Hours of Operation: 8:30 a.m. to 5:00 p.m.)
Case 4-CA-171036

Policies

Kelly complies with all applicable local, state, and federal employment laws. Please contact your Kelly representative if you need further information.

Select Policy Below

Notice to Employees- Labor Relations Board Posting (/us-mykelly/siteassets/united-states---mykelly/files/policies/nlrb-notice-2020.pdf)

A Summary of Your Rights Under the Fair Credit Reporting Act (https://files.consumerfinance.gov/f/documents/bcfp_consumer-rights-summary_2018-09.docx)

A Summary of Your Rights Under the Fair Credit Reporting Act - Spanish (https://files.consumerfinance.gov/f/documents/bcfp_consumer-rights-summary_2018-09_es.docx)

Accommodation Policy (/us-mykelly/siteassets/united-states---mykelly/files/policies/e3114_ada_policy.pdf)

Anti-Harassment Policy and Reporting Procedure (/us-mykelly/siteassets/united-states---mykelly/files/working-with-kelly/e1845_harassment_policy.pdf)

Anti-Retaliation Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/anti-retaliation_policy.docx)

Assignment Information and Employment Termination Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/termination_of_employment_policy__e76.pdf)

Business Travel (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/e46_temp_travel_policy_12-19.docx)

Code of Conduct (http://ir.kellyservices.com/Code_Business_Conduct_and_Ethics.cfm)

Commitment to Absolute Zero (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/our_commitment_to_absolute_zero.doc)

Coronavirus Policy (/us-mykelly/siteassets/united-states---mykelly/files/policies/coronavirus-policy.docx)

Drug-Free Workplace and Substance Abuse Policy (/us-mykelly/siteassets/united-states---mykelly/files/working-with-kelly/e2400_drug_screen_policy.pdf)

Emergency Responder Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/emerg_responder_policy.doc)

Employment Arbitration Rules and Mediation Procedures (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/employment_arbitration_rules_and_mediation_procedures_e

Employment and Income Verification Policy (/us-mykelly/kelly-101/employment-and-income-verification-policy/)

Equal Employment Opportunity and Affirmative Action (/us-mykelly/siteassets/united-states---mykelly/files/policies/e2408_eeo_policy.pdf)

Family and Medical Leave Policy (/us-mykelly/siteassets/united-states---mykelly/files/policies/e1081_fmla_pol_prod.doc)

Garnishments and Collection Fees (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/garnishmentsandcollectionfees.doc)

Healthcare Employee Handbook Supplement (/us-mykelly/siteassets/united-states---mykelly/uploadedFiles/United_States_-_MyKelly/3-Career/Kelly_Healthcare/e1299_khr_handbook_supp.docx)

Meal and Rest State-Specific Laws (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/states_w_meal-rest_reqs.docx)

Military Leave of Absence Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/kte_military_policy.docx)

Nursing policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/e234_nursing_policy.doc)

Pay Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/e150_pay_policy.docx) Privacy Statement (http://kellyservices.com/Global/Privacy_Statement/)

Privacy Statement Regarding Human Trafficking and Slavery (https://www.kellyservices.com/global/sectionless-pages/human-trafficking-policy/)

Relationships Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/relationships_policy.docx)

Safety Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/safetypolicy.doc)

Social Media Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/social_media_policy_eng.docx)

Voting Leave Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/voting_policy.doc)

Weapons Policy (/us-mykelly/siteassets/united-states---mykelly/files/policies/e1323_weapons_policy.pdf)

Workers' Compensation Policy Numbers (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/getting_paid/mykelly-wc_policy_numbers_2020.docx)

Workplace Violence Policy (/us-mykelly/siteassets/united-states---mykelly/uploadedfiles/united_states_-_mykelly/2-kelly_101/workplaceviolence.doc)

State Policies

Please Select Your State Below to View All Policies

ARIZONA

CALIFORNIA

COLORADO

CONNECTICUT

DELAWARE

ILLINOIS

KENTUCKY

MAINE

MARYLAND

MASSACHUSETTS

MICHIGAN

MINNESOTA

MISSISSIPPI

NEVADA

NEW JERSEY

NEW YORK

NEW YORK CITY

OREGON

PENNSYLVANIA

RHODE ISLAND

SOUTH CAROLINA

TEXAS

VERMONT

WASHINGTON

WASHINGTON DC

FORM NLRB 4728 (10-13)

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KELLY SERVICES, INC.
(EMPLOYER)

Dated: FEB 05 2020

By: VP, Chief Litigation/Employment Law Counsel
REPRESENTATIVE TITLE

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NLRB, 100 E. Penn Square, Suite 403, Philadelphia, PA 19107
(Telephone: 215-597-7601; Facsimile: 215-597-7658).
(Hours of Operation: 8:30 a.m. to 5:00 p.m.)
Case 4-CA-171036

CONFIRMATION OF 60-DAY POSTING

Kelly Services, Inc.
Case 04-CA-171036

The Notice to Employees provided by the National Labor Relations Board in the above matter remained continuously and conspicuously posted for at least 60 days both manually and on the Employer's intranet.

CHARGED PARTY/RESPONDENT

By: Kristen L. Yurkovich

Title: Litigation / Legislative Manager

Date: May 26, 2020

CERTIFICATION OF COMPLIANCE

RE: Kelly Services, Inc.
Case 04-CA-171036

As required by the Board's Order in this matter, this document is a sworn certification of the steps that Respondent has taken to comply with the Board's Order.

On or about April 9 through 15, 2020, Respondent notified employees and former employees that the Dispute Resolution and Mutual Agreement to Binding Arbitration was revised to make it clear that the Agreement does not constitute a waiver of their right to recover backpay or other monetary remedies from the National Labor Relations Board, Respondent provided them with a link to the revised version of the document. The revised version of the Dispute Resolution and Mutual Agreement to Binding Arbitration, as well as a copy of the signed and dated Notice were sent to approximately 1.7 million individuals.

I have completed this Certification of Compliance and state under penalty of perjury that it is true and correct.

RESPONDENT

By: Kristen L Yurkiw
Title: Litigation/Legislative Manager
Date: June 8, 2020

This form should be returned to the Compliance Officer via e-file.

CERTIFICATION OF COMPLIANCE

RE: Kelly Services, Inc.
Case 04-CA-171036

As required by the Board's Order in this matter, this document is a sworn certification of some of the steps that Respondent has taken to comply with the Board's Order.

On or about September 21, 2020through October 2, 2020, Respondent notified, by mail, employees and former employees that the Dispute Resolution and Mutual Agreement to Binding Arbitration was revised to make it clear that the Agreement does not constitute a waiver of their right to recover backpay or other monetary remedies from the National Labor Relations Board. The revised version of the Dispute Resolution and Mutual Agreement to Binding Arbitration, as well as a copy of the signed and dated Notice were sent to approximately 26,538 individuals.

I have completed this Certification of Compliance and state under penalty of perjury that it is true and correct.

RESPONDENT

By: Susan L Yuen
Title: Litigation/Legislative Manager
Date: October 5, 2020

This form should be returned to the Compliance Officer via e-file.

FORM NLRB 4728 (10-13)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

APPENDIX A

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that bars or restricts your right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise or the rights listed above.

WE WILL rescind the Dispute Resolution and Mutual Agreement to Binding Arbitration or revise it to make clear to all employees that the agreement does not restrict their right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Dispute Resolution and Mutual Agreement to Binding Arbitration in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement

KELLY SERVICES, INC.
(EMPLOYER)

Dated: FEB 05 2020

By: VP, Chief Litigation & Employment Law Counsel
REPRESENTATIVE TITLE

The Board's decision can be found at www.nlrb.gov/case/04-CA-171036 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov and the toll-free number (844) 762-NLRB (6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer,

NLRB, 100 E. Penn Square, Suite 403, Philadelphia, PA 19107
(Telephone: 215-597-7601; Facsimile: 215-597-7658),
(Hours of Operation: 8:30 a.m. to 5:00 p.m.)
Case 4-CA-171036

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
100 E Penn Square
Suite 403
Philadelphia, PA 19107

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

Agent's Direct Dial: (215) 597-5354

October 21, 2020

VIA E-MAIL AND REGULAR MAIL

Shireen Y. Wetmore, Esquire
Seyfarth Shaw LLP
560 Mission Street, Suite 3100
San Francisco, CA 94105-2930
swetmore@seyfarth.com

Re: Kelly Services, Inc.
Case 04-CA-171036

Dear Ms. Wetmore:

The above-captioned case has been closed on compliance. Please note that the closing is conditioned upon continued observance of the Board Order.

Very truly yours,

Harold A. Maier

HAROLD A. MAIER
Acting Regional Director

cc: Joseph Gibley, Esquire
Gibley and McWilliams, P.C.
524 N. Providence Road
Media, PA 19063-3056

Marielle Macher, Esquire
Community Justice Project
c/o T Jason Noye
118 Locust Street
Harrisburg, PA 17101-1414

Kelly Services, Inc
3 Montage Mountain Road
Moosic, PA 18507-1754

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C 3512

DO NOT WRITE IN THIS SPACE

Case	Date Filed
20-CA-172971	3/30/2016

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
KELLY SERVICES, INC

b. Tel. No.
248-362-4444

c. Cell No.
231-233-1719

f. Fax No.
248-822-3387

g. e-Mail
PEARCGA@KELLYSRVKES COM

d. Address *(Street, city, state, and ZIP code)*
999 WEST BIG BEAVER RD
TROY, MI 48084-4782

e. Employer Representative

h. Number of workers employed
50,000+ (EST.)

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
TEMP STAFFING AGENCY

j. Identify principal product or service
TEMPORARY STAFFING SERVICES - ADMINS

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
I BELIEVE MY EMPLOYER, KELLY SERVICES, INC., HAS RETALIATED AGAINST ME, TO INCLUDE ELIMINATING MY CURRENT POSITION/JOB ([redacted]) DUE TO EXERCISING MY RIGHTS UNDER SECTION 7 OF THE ACT

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
[redacted]

4a. Address *(Street and number, city, state, and ZIP code)*
[redacted]

4b. Tel. No.

4c. Cell No. [redacted]

4d. Fax No. N/A
[redacted]

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
N/A

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By [redacted] KELLY [redacted]
(signature of representative or person making charge)

Address _____

MARCH 30, 2016
(date)

Tel. No.

Office, if any, Cell No.

Fax No.

e-Mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

Agency Website: www.nlrb.gov
Telephone: (415)356-5130
Fax: (415)356-5156

Download
NLRB
Mobile App

March 31, 2016

Kelly Services, Inc.
999 West Big Beaver Road
Troy MI 48084

Re: Kelly Services, Inc.
Case 20-CA-172971

Dear Sir or Madam:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney JOSEPH RICHARDSON whose telephone number is (415)356-5186. If this Board agent is not available, you may contact Supervisory Attorney JENNIFER BENESIS whose telephone number is (415)356-5175.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

JOSEPH F. FRANKL
Regional Director

Enclosures:
1. Copy of Charge
2. Commerce Questionnaire

Revised 3/21/2011 NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME: Kelly Services, Inc.	CASE NUMBER 20-CA-172971

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed).*

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT *(Check appropriate box):* **[ ] CALENDAR YR [ ] 12 MONTHS or [ ] FISCAL YR** *(FY dates)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $		
H. **Gross Revenues** from all sales or performance of services ***(Check the largest amount)*** [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KELLY SERVICES, INC. Charged Party and (b) (6), (b) (7)(C) Charging Party	**Case 20-CA-172971**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on March 31, 2016**,** I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Kelly Services, Inc.
999 West Big Beaver Road
Troy MI 48084

March 31, 2016	Caroline Barker, Designated Agent of NLRB
Date	Name
	/s/ Caroline Barker
	Signature

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

Agency Website: www.nlrb.gov
Telephone: (415)356-5130
Fax: (415)356-5156

Download
NLRB
Mobile App

March 31, 2016

(b) (6), (b) (7)(C)

Re: Kelly Services, Inc.
Case 20-CA-172971

Dear (b) (6), (b) (7)(C):

The charge that you filed in this case on March 30, 2016 has been docketed as case number 20-CA-172971. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney JOSEPH RICHARDSON whose telephone number is (415)356-5186. If this Board agent is not available, you may contact Supervisory Attorney JENNIFER BENESIS whose telephone number is (415)356-5175.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing *Form NLRB-4701, Notice of Appearance*. This form is available on our website, www.nlrb.gov, or at the Regional office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: As the party who filed the charge in this case, it is your responsibility to meet with the Board agent to provide a sworn affidavit, or provide other witnesses to provide sworn affidavits, and to provide relevant documents within your possession. Because we seek to resolve labor disputes promptly, you should be ready to promptly present your affidavit(s) and other evidence. If you have not yet scheduled a date and time for the Board agent to take your affidavit, please contact the Board agent to schedule the affidavit(s). If you fail to cooperate in promptly presenting your evidence, your charge may be dismissed without investigation.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website www.nlrb.gov or from the Regional Office upon your request. *NLRB Form 4541, Investigative Procedures* offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

JOSEPH F. FRANKL
Regional Director

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

(b) (6), (b) (7)(C)

and

Kelly Services, Inc.

CASE 20-CA-172971

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF

Kelly Services, Inc.

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ REPRESENTATIVE IS AN ATTORNEY

☒ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: E. Joseph Connaughton

MAILING ADDRESS: 101 West Broadway, Ninth Floor, San Diego, CA 92101-8285

E-MAIL ADDRESS: jconnaughton@paulplevin.com

OFFICE TELEPHONE NUMBER: (619) 237-5200

CELL PHONE NUMBER: (619) 744-3645 *FAX:* (619) 615-0700

SIGNATURE: *(Please sign in ink)*

DATE: 4-11-16

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP
ATTORNEYS AT LAW

101 WEST BROADWAY, NINTH FLOOR · SAN DIEGO, CALIFORNIA 92101-8285
PHONE 619-237-5200 | FAX 619-615-0700 | PAULPLEVIN.COM

E. JOSEPH CONNAUGHTON 619-744-3645
jconnaughton@paulplevin.com

April 28, 2016

VIA E-MAIL AND U.S. MAIL

Joseph Richardson
Field Attorney
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

Re: (b) (6), (b) (7)(C) *v. Kelly Services*
NLRB Case No. 20-CA-172971
Kelly's Position Statement regarding Managerial Status

Dear Mr. Richardson:

Thank you for the opportunity to submit this preliminary position statement addressing the threshold question of whether (b) (6), (b) (7)(C) is a "managerial employee." As Kelly explains in more detail below, (b) (6), (b) (7)(C), as a (b) (6), (b) (7)(C) earning (b) (6), (b) (7)(C) per year, would seem to qualify as a managerial employee under the National Labor Relations Act.

I. LEGAL STANDARD FOR THE MANAGERIAL EXCEPTION

It is well-settled that "managerial employees" are not covered by the National Labor Relations Act. *See NLRB v. Bell Aerospace Co. Division*, 416 U.S. 267, 289 (1974) (all authority points "unmistakably to the conclusion that 'managerial employees' are not covered by the Act"). Employees qualify as "managerial" if they "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* at 288, citing with approval *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320, 323 n.4 (1947). The policy behind excluding managerial employees is that the nature of their duties closely aligns them with management interests. *Bell Aerospace*, 416 U.S. at 286-88.

To qualify for the managerial exception, an employee need not manage the entire enterprise and need not even be an executive. Rather, the employee's duties need only include the exercise of managerial discretion, even if the reach of that discretion is

limited. For example, in *ITT Grinnell*, 253 N.L.R.B. 584 (1980), the Board found that an Accounts Receivable Collection Coordinator was a managerial employee, even though he did not have final decision-making authority regarding customer-credit decisions. Rather, it was sufficient that he made credit recommendations and had the authority to grant concessions. In particular, the Board cited his ability to make a $3,000 concession on a $100,000 order as evidence of his managerial status. *Id.* at 584-85. *See also Simplex Indus.*, 243 NLRB 111, 112-13 (1979) (transportation manager and buyer qualified as managerial).

II. BACKGROUND ON KELLY SERVICES

Kelly Services is a workforce solutions company. In addition to providing staffing services (via temporary, temporary-to-hire, and direct-hire employees), Kelly also offers "Project Services," in which it provides expert consulting across a wide variety of industries. Through Project Services, Kelly may supply clients with scientists, engineers, or other technical employees; these engagements can be complex and lengthy in duration, so they are typically memorialized in written Statements of Work ("SOWs").

III. (b) (6), (b) (7)(C) RESPONSIBILITIES AT KELLY SERVICES

(b) (6), (b) (7)(C) position is (b) (6), (b) (7)(C) .

A. (b) (6), (b) (7)(C) Job Description

(b) (6), (b) (7)(C) job description, which is attached as Appendix A, explains that the purpose of [redacted] position is to:

(b) (6), (b) (7)(C)

See Appendix A (Job Description – (b) (6), (b) (7)(C)).

Kelly Services employs a job grading system, with positions ranging from 30 (the lowest level) to 51 (the highest level). (b) (6), (b) (7)(C) position is designated as a grade (b) (6), (b) (7)(C) below a grade that includes Vice Presidents. When [redacted] joined Kelly Services in [redacted], (b) (6), (b) (7)(C) earned a starting salary of (b) (6), (b) (7)(C) [redacted] was promoted to (b) (6), (b) (7)(C) in [redacted] 2012, and by 2015 [redacted] base salary had progressed to (b) (6), (b) (7)(C), plus a full range of managerial benefits. See Appendix B. *Cf. Packard Motor Car v. NLRB*, 330 U.S. 485, 491 n. 2 (1947) (summarily dismissing idea that high-level employees fell under the NLRA – "If a union of vice presidents, presidents or others of like relationship to a corporation comes here claiming rights under this Act, it will be time enough then to point out the obvious and relevant differences between the . . . foremen of this company and corporate officers . . .").

B. (b) (6), (b) (7)(C) Own Description of [redacted] Duties and Responsibilities is Instructive

(b) (6), (b) (7)(C) own description of [redacted] role and responsibilities would seem to be the best evidence of [redacted] status. In those representations, (b) (6), (b) (7)(C) repeatedly confirms that [redacted] is a managerial employee.

In (b) (6), (b) (7)(C) recently-filed civil lawsuit against Kelly, [redacted] described (b) (6), (b) (7)(C) as a mission-critical employee with the highest levels of responsibility. In [redacted] own words:

- Kelly hired (b) (6), (b) (7)(C) after conducting "an exhaustive, nationwide search to recruit a significantly experienced individual who would bring the requisite education, significant expertise, and proven financial results to Defendant." Cmplt. ¶ 12.

- Kelly provided (b) (6), (b) (7)(C) with a salary of (b) (6), (b) (7)(C) per year, plus full benefits. Kelly also provided Plaintiff with a "special incentive program" bonus, worth up to (b) (6), (b) (7)(C) annually for 2011 and 2012. Cmplt. ¶ 14.

- "Plaintiff was elevated to positions of increasing scope and responsibility, including being hand-selected by the Defendant's executive team in 2012 . . . to architect and lead Defendant's first (b) (6), (b) (7)(C)." Cmplt. ¶ 18.

- Plaintiff was repeatedly described by Kelly as "critical to its overall professional and technical business strategy, SOW growth, and corporate global compliance and governance." Cmplt. ¶ 18.

- Senior-level supervisors and offices "roundly describe Plaintiff as . . . a uniquely-qualified asset with a broad capacity of critical skills, and irreplaceable, particularly in terms of [redacted] responsibilities required as (b) (6), (b) (7)(C) (b) (6), (b) (7)(C)." Cmplt. ¶ 18.

See Appendix B (Plaintiff's Civil Complaint).

Likewise, in [redacted] recent application for a new position at Kelly Services, (b) (6), (b) (7)(C) explained that [redacted]:

- (b) (6), (b) (7)(C) Appendix C, p. 2.
- (b) (6), (b) (7)(C) Appendix D, pp. 1-2.

(b) (6), (b) (7)(C) further stated that "thought leadership" has "been an integral component of my job duties for approximately 15 years . . . At Kelly, this has also been a necessary and common function, to include complete architecture and subsequent execution of the (b) (6), (b) (7)(C) Appendix D, p. 2. For example, (b) (6), (b) (7)(C) authored (b) (4)

Finally, according to (b) (6), (b) (7)(C), [redacted] had governance oversight on $600,000,000 in business across six continents. Compare to *ITT Grinnell, supra*, 253 N.L.R.B. at 584-85 (collections coordinator with authority to grant $3,000 concession deemed exempt).

Without putting too fine a point on it, (b) (6), (b) (7)(C) description of [redacted] duties would seem to distance [redacted] from the non-managerial employees that the NLRA was designed to protect.

IV. CONCLUSION

In light of the foregoing, particularly [redacted] own description of [redacted] duties and responsibilities, [redacted] would seem to qualify as a managerial employee, and thus not be covered by the NLRA.

Should you need any additional information, please let me know.

Sincerely,

PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP

By: _____
E. Joseph Connaughton

Attachments

APPENDIX A

(b) (6), (b) (7)(C)

Purpose

(b) (6), (b) (7)(C)

Role and Responsibilities

(b) (6), (b) (7)(C)

Key Stakeholders

(b) (6), (b) (7)(C)

Critical Skills

(b) (6), (b) (7)(C)

APPENDIX B

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Attorneys for Plaintiff
(b) (6), (b) (7)(C)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C) an individual,

Plaintiff,

v.

KELLY SERVICES, INC., and DOES 1-20 inclusive,

Defendants.

Case No.

COMPLAINT FOR DAMAGES

1. **VIOLATION OF CALIFORNIA GOVERNMENT CODE § 12940(h) (Retaliation)**
2. **VIOLATION OF CALIFORNIA LABOR CODE § 1102.5(b) (Retaliation)**
3. **WRONGFUL DEMOTION IN VIOLATION OF PUBLIC POLICY**
4. **BREACH OF CONTRACT**
5. **VIOLATION OF CALIFORNIA LABOR CODE § 226(f)**
6. **VIOLATION OF CALIFORNIA LABOR CODE § 1198.5(a), (b)**

DEMAND FOR JURY TRIAL
UNLIMITED CIVIL ACTION

BY FAX

MILLSTONE PETERSON & WATTS, LLP

I. INTRODUCTION

1. Plaintiff (b) (6), (b) (7)(C) ("**Plaintiff**") is informed and believes, and on that basis alleges, that Kelly Services, Inc. ("**Defendant**") is and at all relevant times mentioned herein was a Delaware corporation registered and qualified to do business within California and doing business in California at all times mentioned in this Complaint.

2. Plaintiff has been employed full-time by Defendant since (b) (6), (b) (7)(C) 2010. At all relevant times Plaintiff performed (b) (6), (duties from (b) (6), (home office located in Roseville, California, Placer County.

3. Plaintiff is unaware of the true names and capacities of the defendants sued herein as Does 1 through 20 inclusive, and therefore Plaintiff sues these Doe defendants by such fictitious names pursuant to section 474 of the Code of Civil Procedure. Plaintiff will amend this Complaint to add the true names and capacities of these Doe defendants when the true names and capacities are determined. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named Doe defendants is liable to Plaintiff as hereinafter alleged and that Plaintiff's rights against such Doe defendants arise from such liability. References to "Defendant" or "Defendants" herein include the defendants sued herein as Does 1 through 20, inclusive.

4. Plaintiff is informed and believes, and on that basis alleges, that at all times herein mentioned each of the Defendants was the agent, servant, and/or employee of each of the other Defendants and in doing the acts and conduct hereinafter alleged, was acting within the course and scope of said agency and employment and with the knowledge, approval, consent, and subsequent ratification of each of the other Defendants.

5. Plaintiff is informed, believes, and on that basis alleges, that at all relevant times, and in connection with the acts, statements, representations, omissions, and conduct alleged herein, each of the Defendants ratified the conduct of each of the other Defendants by subsequent statements or conduct.

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II. JURISDICTION AND VENUE

6. At all relevant times alleged herein, Defendant had contacts with California sufficient to confer jurisdiction over Defendant. At all relevant times alleged herein, Defendant maintained offices throughout California, employed persons in California, and conducted business in California, including, but not limited to, Placer County.

7. Pursuant to California Government Code section 12965, subdivision (b), venue is proper in Placer County because it is the county in which Plaintiff performed work for Defendant.

III. ALLEGATIONS APPLICABLE TO ALL CAUSES OF ACTION

8. Plaintiff brings this action to recover damages against Defendant because of Defendant's wrongful, unlawful, and tortious conduct. As more particularly alleged below, Defendant unlawfully retaliated against Plaintiff by, including but not limited to, eliminating Plaintiff's position and subjecting [redacted] to a Reduction of Force ("**RIF**"), for the reason that Plaintiff had opposed practices forbidden by the California Fair Employment and Housing Act ("**FEHA**") and had engaged in "whistleblowing" activity protected by California's "whistleblower" statute, Labor Code Section 1102.5 ("**Section 1102.5**").

9. Plaintiff was born [redacted] and is [redacted]

10. Plaintiff served [redacted] nation in the [redacted] and [redacted] [redacted] (**Attachment "1"**).

11. Plaintiff is a [redacted]

A. The Bait & Switch.

12. In early 2009, Defendant was losing its competitive advantage within the higher-level Professional/Technical ("**P/T**") Staffing marketplace, suffering extremely low profit margins and failing in its repeated attempts to formally enter into the project-based Statement-of-Work ("**SOW**") arena described as "*critical*" to maintaining Defendant's long-term, competitive viability. Senior Kelly leadership, led by [redacted] Kelly Outsourcing Consulting Group "("**KellyOCG**") [redacted] drafted a comprehensive Strategic Business Case to form Defendant's first entry into the Project Management space. Defendant commenced an exhaustive, nationwide search to

recruit a significantly experienced individual(s) who would bring the requisite education, significant expertise, and proven financial results to Defendant.

13. In 2009 Plaintiff and [redacted] business partner of almost 20 years [redacted] were heavily recruited by Defendant before ultimately joining the Company in or about [redacted] 2010. Defendant aggressively recruited Plaintiff and [redacted] from a major, publicly-traded competitor to whom they had recently sold their private engineering/scientific/IT consulting firm and with whom they were satisfactorily employed under very lucrative terms, including a multi-year revenue "*earn-out*" scenario with equity inducements. Defendant was intimately familiar with Plaintiff's then-current employment terms and market worth because Defendant required Plaintiff to provide copies of [redacted] IRS Form W-2s, all copies of Defendant's Asset Purchase Agreement(s) executed by Plaintiff, current restrictive covenants, and copies of personal and corporate tax returns for the prior three (3) years.

14. After repeated, unsuccessful attempts by Defendant to persuade Plaintiff to leave [redacted] then-current employer, Defendant presented Plaintiff with a "*special incentive program*" quarterly and annual financial bonus tied specifically to Plaintiff's future success in the Project Management space Defendant strategically was attempting to enter. Defendant relayed to Plaintiff that this "*special incentive program*" bonus (worth up to an additional [redacted] annually for "*2010, 2011*" and "*beyond*" in additional compensation above Defendant's offer of [redacted] base salary, and full benefits) (**Attachment "2"**) was "*specially approved*" by Defendant's Board of Directors and senior executives and proof of Defendant's strategic, long-term commitment. After approximately six (6) months of Defendant's aggressive recruitment tactics, and in reliance on these special promises by Defendant and its repeated promises of long-term, assured employment, Plaintiff accepted Defendant's offer, left [redacted] then-current employment, and joined Defendant's operation in [redacted] 2010.

15. Plaintiff (and [redacted] commenced employment after going through required "*assimilation*" with Defendant in [redacted] 2010. Plaintiff (and [redacted] were to architect and lead Defendant's first Project Management Office ("**SOW business**") within Defendant's largest and most critical customer accounts. Plaintiff was tasked with designing and leading Company-wide

training on all Project-Based services and SOW efforts and developing an expansive multi-million dollar customer portfolio of SOW business across the globe. Plaintiff (along with [redacted] ultimately built a SOW-based P/T solutions platform in excess of $40 million dollars across the globe, throughout a wide mix of customers (including Defendant's largest and most critical as Defendant specifically desired of Plaintiff) in less than three (3) years. Net profits alone in 2012 exceeded $5 million dollars for Defendant based solely upon the business unit Plaintiff and [redacted] jointly led as Product Leaders.

16. Despite Plaintiff's exemplary performance, Plaintiff did not receive the promised "*special incentive program*" bonuses [redacted] had earned in 2010, 2011, or in any year "*beyond*". In or about March of 2011 and 2012, and again in March of 2013 and thereafter, Plaintiff's superiors and Defendant's managing agents assured Plaintiff that [redacted] promised "*special incentive program*" bonuses had been earned and would be paid. Plaintiff relied on these promises, and continues to rely on them out of respect for Defendant's word, as Defendant prides itself as a fair and honest employer, but, to date, Defendant has not abided by its word or paid Plaintiff the "*special incentive program*" bonus wages [redacted] has earned.

17. While continuing in good faith to rely on Defendant's promises, Plaintiff's loyalty and dedication to Defendant and its employees remained intact, and [redacted] continued to excel. Plaintiff each year achieved or significantly exceeded all new performance-based, non-special bonus targets (albeit these plans promised and provided far less bonus pay to Plaintiff than the "*special incentive program*" bonuses Defendant had contractually obligated itself to pay). Likewise, each year Defendant provided Plaintiff with salary increases in recognition of [redacted] continued high value and continued stellar performance.

18. Over more than six years (6) of employment, there was not a single occasion when Plaintiff was counseled, placed on any type of performance improvement plan, or subject to disciplinary action of any kind. In fact, Plaintiff repeatedly was elevated to positions of increasing scope and responsibility, including being hand-selected by the Defendant's executive team in 2012, again after going through required "*assimilation*", to architect and lead Defendant's [redacted] Office ([redacted] **Office**"), and repeatedly was described by Defendant as

critical to its overall P/T business strategy, SOW growth, and corporate global compliance and governance. Plaintiff's performance reviews and repeated professional recommendations by senior-level supervisors and officers, (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) roundly describe Plaintiff as extremely dedicated, a uniquely-qualified asset with a broad capacity of critical skills, and irreplaceable, particularly in terms of (b) (6), responsibilities required as (b) (6), (b) (7)(C).

B. Finance Distributes the PowerGen Budget As Normal (Not Confidential).

19. In or about spring of 2015, Plaintiff and (b) (6), (b) (7)(C) initiated strategic discussions with Defendant's senior management (b) (6), (b) (7)(C)) regarding Defendant's expressed "*intense*" and "*immense*" interest in increasing the scale, scope, and strategic footprint of its Power Generation/Utilities Industry specialty practice ("**PowerGen**"), which (b) (6), (b) (7)(C) had first envisioned and architected for Defendant the previous year. Excited by the prospect, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) directed Plaintiff and (b) (6), (b) (7)(C) to immediately develop a comprehensive Business Plan in advance of Defendant's corporate strategic planning for fiscal year 2016 that was upcoming so that Defendant could accelerate the PowerGen practice on behalf of Defendant's Outsourcing and Consulting Group ("**KellyOCG**"). Plaintiff and (b) (6), (b) (7)(C) complied.

20. After Defendant approved the PowerGen business plan, the KellyOCG Finance Department was directed to officially develop an annual budget against which the PowerGen business results would be tracked monthly for the remaining months of fiscal year 2015 and then into fiscal year 2016 under Cost Center Branch "**0024LZ**". The PowerGen budget was published and distributed by Defendant internally in the normal manner at the same time as, and along with, all other budget items (all **NON-CONFIDENTIAL**).

C. Defendant Transfers (b) (6), (b) (7)(C) and 18 Other '*Experts*' To A New Sales Group.

21. On or about the early morning of (b) (6), (b) (7)(C) 2015, Defendant hastily arranged several unannounced conference calls with (b) (6), (b) (7)(C) and 18 other employees within KellyOCG. The call lasted approximately 15 minutes. Participants, all of whom were deemed "*experts*" by Defendant, were told they had been selected to join a new business group. No explanation was provided, no questions were taken. The compelled transfer was mandatory and involuntary since, as the

participants were told, "*decisions have already been made*." This mirrored a familiar pattern of "*re-organization*" by Defendant with which employees had unfortunately become very familiar over the last several years.

22. (b) (6), (b) (7)(C) later, on or about (b) (6), (b) (7)(C) 2015, Defendant transferred (b) (6), (b) (7)(C) and its 18 other identified "*experts*" to a new sales group known as the Global Solutions Channel Sales Group ("**GS Channel Sales Group**"), led by (b) (6), (b) (7)(C) to whom (b) (6), (b) (7)(C) had never before spoken nor met.

D. (b) (6), (b) (7)(C) '*Assimilation*' Into (b) (6), (b) (7)(C)s New Sales Group Hits A Snag.

23. Almost immediately after (b) (6), (b) (7)(C) transfer, (b) (6), complained to Plaintiff and others about perceived mistreatment by (b) (6), (b) (7)(C) including demeaning age-related comments (b) (6), (b) (7)(C) had made to (b) (6), (b) (7)(C) during the week of (b) (6), (b) (7)(C) 2015, when (b) (6), (b) (7)(C) and the other "*experts*" of the GS Channel Sales Group had travelled to Defendant's corporate headquarters, in Troy, Michigan, for another mandatory, formal "*assimilation*".

24. On the night of (b) (6), (b) (7)(C) 2015, during a mandatory drinking session at a local watering hole (later described by Defendant as a "*team-building*" exercise), (b) (6), (b) (7)(C) warned (b) (6), (b) (7)(C) "*Hey, if you're going to work with me, we work hard and we play hard, buddy. Remember, we're not all collecting Social Security so I want my people having fun and enjoying themselves*" and "*Well, this is a tough job. Try to keep up, (b) (6), (b) (7)(C), 'cause we drive hard.*" This comment by (b) (6), (b) (7)(C) was made to (b) (6), (b) (7)(C) directly after (b) (6), had repeatedly declined (b) (6), (b) (7)(C) repeated attempts to force (b) (6), (b) to drink heavily (supposedly as part of the required "*assimilation*" into (b) (6), (b) (7)(C) new team).

E. The '(b) (6), (b) (7)(C) Is Fired.

25. On or about (b) (6), (b) (7)(C) 2015, and (b) (6), (b) (7)(C) after (b) (6), (b) (7)(C) had been transferred to the GS Channel Sales Group and then warned by (b) (6), (b) (7)(C) during an evening of "*assimilation*" training at a local pub that the (b) (6), (b) (7)(C) needed to "*keep up*," (b) (6), (b) (7)(C) received a telephone call from (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) They informed (b) (6), (b) (7)(C) of (b) (6), termination, effective immediately. The termination was specifically not performance-related. Rather, according to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), Defendant no longer intended to

pursue PowerGen, effective immediately, because it "*did not fit into Kelly's strategy*" and, accordingly, [redacted] was informed [redacted] employment had been terminated effective immediately. There was no discussion of other employment opportunities within the Company. There was no discussion at all, other than an odd text message [redacted] sent to [redacted] one can only describe as "rubbing it in" (**Attachment "3"**).

26. Plaintiff first learned about [redacted] termination via a Company-wide announcement emailed by [redacted] that same day, [redacted] 2015 (**Attachment "4"**). Shortly thereafter, Plaintiff received a phone call from [redacted] who was devastated. [redacted] said [redacted] had been terminated over the telephone. Plaintiff asked why? [redacted] said [redacted] had been told by [redacted] and [redacted] that Defendant was eliminating the PowerGen practice. Plaintiff was unaware of any such decision – yet [redacted] was within and solely attached to PowerGen from a cost center perspective (i.e., Cost Center Branch "**0024LZ**").

F. <u>The '*Lift And Shift*'</u>.

27. Plaintiff was completely caught off guard by [redacted] termination and deeply troubled by the stated reason given to [redacted] Plaintiff was aware of [redacted] earlier complaints about perceived mistreatment by [redacted] as well as the demeaning age-related comments [redacted] had made to [redacted] during their initial meeting at the "*assimilation*" in Troy, Michigan, and was also aware other employees knew the same. Plaintiff also was aware [redacted] was experiencing [redacted] related issues just prior to and at the time of [redacted] termination and knew many of [redacted] supervisors also were aware of the same.

28. And, far from Defendant <u>abandoning</u> the PowerGen business, as [redacted] and [redacted] had disclosed to [redacted] as justification for firing [redacted] Plaintiff was aware that Defendant was at that very moment <u>actively pursuing</u> PowerGen opportunities. Indeed, just a short while later that very same day ([redacted] 2015), Plaintiff received an email from [redacted] supervisor, [redacted] and [redacted] directing Plaintiff to transfer most of [redacted] PowerGen sales opportunity pipeline to two younger, less-qualified individuals -- [redacted]") and [redacted] -- and to arrange for [redacted] to attend an upcoming meeting with a PowerGen customer (Avista Utilities in Spokane, WA) in place of [redacted] and Plaintiff. Again, this was the same PowerGen

sales opportunity pipeline for which Plaintiff was responsible yet was now being ordered to transfer to two younger, less-qualified individuals. Furthermore, Plaintiff was keenly aware that, in fact, Defendant was not eliminating PowerGen but rather was in the process of finalizing the entire 2016 PowerGen budget -- a **NON-CONFIDENTIAL** budget with Plaintiff's and (b) (6), (b) (7)(C) costs still fully-loaded within it for the entire fiscal year 2016. Plaintiff's concerns only deepened as to what Defendant may have been contemplating with this series of unexpected, unannounced decisions, especially since Plaintiff was well aware neither (b) (6), (b) (7)(C) had any previous material knowledge of the PowerGen business plan, its associated budget perimeters, or its expansive, growing pipeline.

29. Over the next several days and weeks, Plaintiff became more troubled by what (b) (6), believed to be unlawful conduct, or at the least, unnecessary legal exposure, by Defendant. On or about (b) (6), (b) (7)(C) 2015, Plaintiff was one of the participants in another hastily arranged conference call directed and organized by (b) (6), (b) (7)(C) (and attended by (b) (6), (b) (7)(C) which had been arranged the same day of (b) (6), (b) (7)(C) termination by (b) (6), (b) (7)(C) for the express purpose of transferring (b) (6), (b) (7)(C) PowerGen pipeline to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C)y and canceling Plaintiff's upcoming customer trip to Avista so (b) (6), (b) (7)(C) could attend instead. The same PowerGen practice (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) had told (b) (6), (b) (7)(C), who in turn had told Plaintiff, was being "*eliminated*" by Defendant.

30. Meanwhile, at or around this same time, Plaintiff learned (b) (6), (b) (7)(C) was attempting to replace (b) (6), (b) (7)(C) in(b) (6), (b) (new GS Channel Sales Group by hiring (b) (6), (b) (7)(C) a younger, less-qualified, and significantly less-educated (b) (6), (b) (7)(C), who also happened to be a personal friend of (b) (6), (b) (7)(C). This was the same GS Channel Sales Group that Plaintiff (and many others) had repeatedly been told was "*all filled up*" and no additional positions available. Defendant's hasty and now contradictory actions were not making any sense to Plaintiff, and (b) (6), was concerned about the Company's legal exposure as a result of the apparently unlawful actions and conduct (b) (6), was witnessing first hand.

G. Plaintiff aka "*The* (b) (6), (b) (7)(C) *Whisperer*" Engages In Protected Activity.

31. On January 4, 2016, Plaintiff brought the above-described concerns to the attention of Defendant's (b) (6), (b) (7)(C) After listening to

Plaintiff's concerns, [redacted] asked Plaintiff if [redacted] would be willing to speak with [redacted] ([redacted]), Defendant's [redacted] in the Litigation Department, to open a formal investigation. Plaintiff agreed and further offered, at that time, to provide supporting documents which Plaintiff believed, and now [redacted] confirmed, could possibly have indicated potential exposure, most likely avoidable, by Defendant with respect to [redacted] abrupt termination, which [redacted] stated [redacted] was unaware had even taken place. [redacted] was aware, however, that [redacted] liked to "*play fast and loose*" and Plaintiff's concerns regarding [redacted] "*wouldn't surprise* [redacted] *in the least*", as [redacted] said [redacted] was all too familiar with [redacted]

32. But it was not [redacted] who contacted Plaintiff. Instead on January 7 and 8, 2016, Plaintiff twice was contacted (again, unannounced) for a formal interview by [redacted] and someone [redacted] introduced as [redacted] Defendant's [redacted]. During the course of the interviews, Plaintiff again disclosed [redacted] possession of documents apparently contradicting Defendant's stated reason for the termination of [redacted] employment. [redacted] was expressly aware of Plaintiff's role as [redacted] and Plaintiff's duty to maintain proper oversight over all KellyOCG programs, including the PowerGen practice. [redacted] was also aware that Plaintiff, like all employees, was expected and had a duty to report any suspected legal exposure to various persons at Defendant, one of whom was [redacted]

33. During the first interview of Plaintiff on January 7, 2016, [redacted] questioned Plaintiff about [redacted] relationship with [redacted] how long they had worked together; whether they were friends; whether they were still communicating; whether Plaintiff had referred [redacted] to an attorney; and whether Plaintiff knew anything about the allegations being made by [redacted] that [redacted] had been wrongfully terminated by Defendant. Plaintiff answered each of [redacted] questions truthfully and to the best of [redacted] recollection. Plaintiff also, without prompting, offered to provide [redacted] with any and all documents in [redacted] possession that could assist [redacted] in conducting a proper, thorough investigation and possibly substantiate any of the potential allegations made by [redacted] since [redacted] termination. [redacted] declined.

34. On January 8, 2016, [redacted] independent of Plaintiff, filed a civil action against Defendant alleging wrongful termination and discrimination. And, on that very same day, [redacted]

and [redacted] phoned Plaintiff, again unannounced, purportedly for a second interview. However, this time the questions posed to Plaintiff were very different than the day before. [redacted] immediately asked Plaintiff for the phone number of any phone Plaintiff either had used or was using to communicate with [redacted]; whether Plaintiff had a Company-issued cell phone; the phone number of any phone [redacted] had used or was using to contact Plaintiff; how often they communicated; and whether they were communicating via email or text message. [redacted] also asked Plaintiff whether [redacted] knew [redacted] counsel, whom [redacted] said was "*Jeremy Millstone*". Plaintiff responded "*of course, he was our attorney for years*" and further relayed to [redacted] that [redacted] "*still speaks to [him] all the time...he's a great guy...and outstanding lawyer*". Plaintiff again offered, again unprompted, to provide [redacted] and [redacted] with documents in Plaintiff's possession that may substantiate any of [redacted] potential allegations and/or illuminate any concerns [redacted] and [redacted] may have. Again, [redacted] declined.

35. During both interviews on January 7 and 8, 2016, [redacted] went to great lengths to correct Plaintiff any time Plaintiff referred to [redacted] as having been "*terminated*" or "*fired*" or "*let go*". [redacted] interrupted Plaintiff each time and expressly corrected Plaintiff to only refer to [redacted] as "'*no longer being at the Company*' *and that is it.*" Lastly, [redacted] instructed Plaintiff that if "*anyone mentioned*" [redacted] name to Plaintiff or inquired about [redacted] that Plaintiff shall immediately refer him or her directly to [redacted] "*and no one else*".

H. <u>A Cover Up By Defendant</u>?

36. On or about January 21, 2016, Plaintiff learned from [redacted] about a very brief letter [redacted] counsel had received from [redacted] reporting that a "*thorough investigation*" had been conducted into [redacted] allegations of unlawful conduct but "*the investigators did not find any substantiation of the allegations . . . .*" [redacted] letter reiterated [redacted] position had been eliminated because the PowerGen industry "*did <u>not</u> fit into Kelly's strategy*". Plaintiff was alarmed and troubled by this information, and utterly perplexed.

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I. Defendant Eliminates Plaintiff '*The* [redacted] *Whisperer's*' Job.

37. On or about [redacted] 2016, Plaintiff was informed via an impromptu conference call by [redacted] that [redacted] job was being eliminated.

38. Defendant hastily arranged this unannounced conference call to be held at 7am PST, this one with 28 other senior leaders, including Plaintiff, within KellyOCG. [redacted] and an [redacted]"), quickly told the 28 employees their jobs were being eliminated effective immediately. No questions were allowed. No questions were taken. No explanations were allowed. No explanations were provided, except [redacted] advised the impacted employees they would have other positions by [redacted] 2016, and the Company specifically did not consider nor intend this to result in a Reduction in Force ("**RIF**").

39. Subsequently, Plaintiff, along with [redacted] colleagues, was instructed to fill-out a "*self-nomination*" job package within two days. Plaintiff, along with [redacted] colleagues, was told by Defendant that, subsequent to the review of [redacted] package, [redacted] would be "*interviewed*" for new positions within the Company by [redacted]. Plaintiff timely submitted [redacted] "*self-nomination*" packet but the promised interviews never took place. To the contrary, [redacted] bragged to Plaintiff that no one would "*even see [Plaintiff's] package*".

J. Defendant Schedules Plaintiff An Interview With Outside Counsel.

40. That very next day, on or about [redacted] 2016, Plaintiff received an email invite from [redacted] legal assistant directing Plaintiff to speak with Defendant's outside counsel, Joe Connaughton ("**Connaughton**"), based in San Diego, about the allegations contained in the civil complaint [redacted] had filed against Defendant on January 8, 2016, a full copy of which was attached for Plaintiff's review.

41. Plaintiff explained in a reply email that same day why [redacted] was apprehensive about submitting [redacted] to questioning by Defendant's outside counsel, noting that [redacted] *that solely depend on my income and benefits from Kelly to support them and I must ensure that their interests are protected above all else, including my own*" (**Attachment "5"**).

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K. Defendant Continues To Engage In A Cover Up?

42. On or about February 12, 2016, Plaintiff received a document from KellyOCG Finance labeled "***BPO 2016 Budget for POWERGEN_CONFIDENTIAL.xls***". That the word "**CONFIDENTIAL**" was in all caps immediately caught Plaintiff's attention. [redacted] contacted Finance for clarification and further direction. It was explained to Plaintiff this was the first time in the Company's history it had ever sent out a budget for "*confidentiality purposes*" and Plaintiff was reminded to "*not distribute nor discuss [it] with anyone*" except for [redacted] and [redacted] Plaintiff learned directly from [redacted] that [redacted] too, was mystified by the "**CONFIDENTIAL**" denotation suddenly accompanying the budget file and "*couldn't tell what they were up to*".

L. [redacted] Is Replaced By A [redacted] And Friend Of [redacted]

43. On or about February 15, 2016, [redacted] replacement, [redacted] commenced employment with Defendant working under [redacted] personal friend, [redacted], in the GS Channel Sales Group as a [redacted].

M. Plaintiff Engages In Additional Protected Activity.

44. On or about February 19-21, 2016, Connaughton conducted three separate telephonic interviews with Plaintiff: two on Friday, February 19, and a third on that following Sunday, February 21. Over the course of the three telephone interviews, Plaintiff spoke with Connaughton for a total of 125 minutes. Connaughton asked Plaintiff to "*start from the beginning...the whole beginning.*" Plaintiff told Connaughton about [redacted] and [redacted] special incentive bonus plans the Company had promised but not yet paid; about the questionable cost center moves back and forth between corporate divisions that [redacted] had directed to supposedly manipulate revenue versus expense lines within the Company's reporting segments in advance of or in conjunction with public press releases and earnings forecasts; about the constant questionable re-organizations and firings of [redacted] employees supposedly under the guise of so-called "*re-orgs*" or "*RIFs*"; about officers of the Company referring to Plaintiff as "*the* [redacted] *Whisperer*" and [redacted] being referred to as '[redacted] in emails from the same officers; about an article, dated May 5 2016, written by Paul Hodgson of Fortune Magazine, which rated the CEO of Kelly Services, Carl Camden, as the fourth most "*overrated CEO*" in America and that Camden had supposedly hit the roof when he learned of it;

about an HR investigation in which [redacted] was questioned involving anti-Sematic jokes told to certain Jewish employee(s) in Troy by other non-Jewish employee(s) in Troy; about the unusually high-level of access to sensitive and confidential information, including litigation, investigations, mergers and acquisition activity, that Plaintiff was given as Defendant's [redacted]; about Plaintiff's position as having been mandated by the Board of Directors in 2012 and [redacted] instruction to Plaintiff that "*no person within the Company, no matter what title they held*", was authorized to interfere with Plaintiff's governance duties; about the Company officer(s) who shook [redacted] down for over $2,100 in 2015 and how Plaintiff tried to prevent that from occurring by requesting that those officer(s) review the law prior to continuing their so-called collections activity against [redacted] about [redacted] well-known, and pre-existing medical conditions, including [redacted]related issues and that all of [redacted] supervisors were well aware of these conditions prior to [redacted] abrupt transfer to [redacted] new group and [redacted] subsequent abrupt termination; about [redacted] being well-known as a very aggressive manager and following the moniker of [redacted] boss and mentor, [redacted], who is self-described as "*Just somebody who works hard and plays hard*" (**Attachment "6"**); about [redacted] having told Plaintiff [redacted] was feeling abused, threatened, and bullied by [redacted] prior to being fired and that [redacted] had expressed that concern to many individuals within the Company, including officers; about [redacted] being known as a hard-drinking, self-described "*Bad Ass*" who supposedly had little patience for [redacted] under [redacted] employ (**Attachment "7"**); about PowerGen being alive and well and part of Defendant's current focus and strategy as evidenced by recent emails, spreadsheets, Salesforce.com database entries, and budgets, now deemed "**CONFIDENTIAL**"; about [redacted] erroneously asserting in [redacted] letter to [redacted] counsel that a "*thorough investigation*" had been conducted but the investigators had found "*no substantiation*" to [redacted]allegations; about the problem of [redacted] having been assigned to conduct the investigation given that [redacted] was the [redacted] who had fired [redacted] over the phone ("the fox guarding the hen house"); and about [redacted]declining Plaintiff's offer to provide documents indicating [redacted]termination was possibly unlawful, or at the least, exposed the Company to possibly avoidable litigation and expense.

/ / /

45. Near the end of their conversation, Connaughton asked Plaintiff how [redacted] felt. Plaintiff responded "*betrayed*". Connaughton asked, "*Well, how does* [redacted] *feel?*" Plaintiff responded, "*Have you ever seen a* [redacted] *cry, Joe?*" Connaughton replied, "*No, have you,* [redacted]*?*" Plaintiff responded "*Yes. Twice. Once, right before* [redacted] *last year. The other time was when* [redacted] *told me* [redacted] *just got fired over the phone while* [redacted] *was headed to* [redacted] *by some* [redacted] *had never even met.*" Connaughton told Plaintiff that [redacted] had "*heard enough*" and then proceeded to advise Plaintiff that [redacted], as Defendant's attorney, was not acting as Plaintiff's attorney and anything they had discussed would not be covered under attorney-client privilege and that Plaintiff should seek the advice of [redacted] own counsel to ensure [redacted] own interests were protected.

N. <u>Defendant Directs Plaintiff To File A Disability Claim For [redacted].</u>

46. On or about February 22, 2016, Plaintiff was instructed by HR to file a claim with the Company's private disability insurer, Prudential, in advance of Plaintiff's long-scheduled [redacted]

47. On or about February 25, 2016, Plaintiff was directed to go on medical leave by Defendant for [redacted]

48. On or about February 29, 2016, Plaintiff's supervisor, [redacted] abruptly cancelled Plaintiff's long-scheduled career-discussion conference call. Meanwhile, Plaintiff received [redacted] most recent pay stub, which continued to list [redacted] Cost Center Branch as "**0024LZ**" (**Attachment "8"**).

O. <u>Defendant Advises Plaintiff [redacted] Has Been 'RIF'd'.</u>

49. On or about March 3, 2016, while on approved medical leave, Plaintiff received another phone call from [redacted], who advised Plaintiff [redacted] was part of a RIF. Plaintiff received [redacted] call while walking out of the [redacted] Medicine Center following a [redacted] test, which Goodin knew about yet had placed the call anyway. [redacted] advised Plaintiff would have three weeks to look for another job within the Company upon [redacted] return from medical leave **(Attachment "9")**.

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49. On or about March 6, 2016, Plaintiff provided a signed declaration, under penalty of perjury, to [redacted] and Connaughton reiterating and memorializing [redacted] efforts to advise Defendant about conduct [redacted] reasonably believed was unlawful (**Attachment '10"**).

50. As of the date of this pleading, April 5, 2016, Plaintiff does not hold a position with Defendant. And, Defendant has advised Plaintiff [redacted] "*does not have a position*" when [redacted] returns from [redacted]

IV. PLAINTIFF'S CAUSES OF ACTION AGAISNT DEFENDANT

FIRST CAUSE OF ACTION
Violation of Cal. Gov. Code § 12940(h) – Retaliation

51. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 50 inclusive, as though fully set forth herein.

52. The California Fair Employment and Housing Act ("**FEHA**"), Government Code Section 12940(h) ("**Section 12940(h)**") makes it unlawful "*[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.*"

53. As detailed above, Plaintiff opposed what [redacted] reasonably believed was unlawful conduct by Defendant in relation to its termination of [redacted] employment, specifically that Defendant's stated reason appeared to Plaintiff to be false to in light of the controverting facts and supporting documents about which Plaintiff was aware and repeatedly had attempted to share with Defendant and its representatives.

54. As a result of Plaintiff's opposition, Defendant eliminated Plaintiff's position and subjected [redacted] to a Reduction in Force.

55. Plaintiff's opposition to Defendant's termination of [redacted] was a substantial motivating reason why Defendant then decided to eliminate Plaintiff's position and subject [redacted] to a Reduction in Force.

56. As a direct, foreseeable, and proximate result of Defendant's wrongful conduct, Plaintiff has suffered substantial harm in the form of economic and non-economic damages in an

amount to be determined at trial, including, but not limited to, lost income and benefits as well as damages for severe emotional distress.

57. Defendant's wrongful conduct was perpetrated against Plaintiff with malice, fraud, and/or oppression. As a result, Plaintiff is entitled to punitive and exemplary damages in an amount sufficient to punish and deter future similarly reprehensible conduct by Defendant.

58. Plaintiff has exhausted [redacted] administrative remedies. On or about April **5**, 2016, Plaintiff filed a Complaint of Discrimination under the California Fair Employment and Housing Act and received a right to sue letter (**Attachment "11"**).

59. Pursuant to Government Code Section 12965(b), Plaintiff is entitled to recover reasonable attorney fees and costs, including expert witness fees, if [redacted] is the prevailing party.

WHEREFORE, Plaintiff prays for judgment against Defendant as set forth below.

SECOND CAUSE OF ACTION
Violation of Cal. Lab. Code § 1102.5 – "Whistleblower" Retaliation

60. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 50 inclusive, as though fully set forth herein.

61. Per California Labor Code Section 1102.5(b) (**"Section 1102.5(b)**"), "*An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.*"

62. As detailed above, Plaintiff disclosed to Defendant and to Defendant's representatives information that [redacted] reasonably believed revealed unlawful conduct by Defendant, including but not limited to information Plaintiff reasonably believed revealed Defendant had possibly unlawfully

terminated [redacted] employment in violation of the FEHA. Plaintiff disclosed this information to persons with authority over [redacted] and to persons with the authority to investigate, discover, or correct the violation or noncompliance.

63. As a result of Plaintiff's "whistleblowing" activity, Defendant then decided to eliminate Plaintiff's position and then subject [redacted] to a Reduction in Force.

64. Plaintiff's "whistleblowing" activity was a substantial motivating reason for Defendant's decision to eliminate Plaintiff's position.

65. As a direct, foreseeable, and proximate result of Defendant's wrongful conduct, Plaintiff has suffered substantial harm in the form of economic and non-economic damages in an amount to be determined at trial, including, but not limited to, lost income and benefits as well as damages for severe emotional distress.

66. Defendant's wrongful conduct was perpetrated against Plaintiff with malice, fraud, and/or oppression. As a result, Plaintiff is entitled to punitive and exemplary damages in an amount sufficient to punish and deter future similarly reprehensible conduct by Defendant.

WHEREFORE, Plaintiff prays for judgment against Defendant as set forth below.

THIRD CAUSE OF ACTION
Wrongful Demotion in Violation of Public Policy

67. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 66 inclusive, as though fully set forth herein.

68. Pursuant to the FEHA, California Government Code Section 12940, subdivision (h), it is an unlawful employment practice and against public policy for an employer to take an adverse employment action against an employee because the employee has opposed conduct the employee reasonably believes is in violation of the FEHA. Defendant violated the express public policy set forth in Section 12940, subdivision (h) of the FEHA by eliminating Plaintiff's position and subjecting Plaintiff to a Reduction in Force because of Plaintiff's protected opposition activity.

69. Pursuant to Labor Code Section 1102.5, it is a violation of public policy to take an adverse employment against an employee in retaliation for the employee having engaged in

protected "whistleblowing" activity. Defendant violated the express public policy set forth in Section 1102.5 by eliminating Plaintiff's positon because of [redacted] protected "whistleblowing" activity.

70. As a direct, foreseeable, and proximate result of Defendant's wrongful conduct resulting in the elimination of Plaintiff's position and being subjected to a Reduction in Force, Plaintiff has suffered substantial harm in the form of economic and non-economic damages in an amount to be determined at trial, including, but not limited to, lost income and benefits as well as damages for severe emotional distress.

71. Defendant's wrongful conduct was perpetrated against Plaintiff with malice, fraud, and/or oppression. As a result, Plaintiff is entitled to punitive and exemplary damages in an amount sufficient to punish and deter future similarly reprehensible conduct by Defendant.

WHEREFORE, Plaintiff prays for judgment against Defendant as set forth below.

FOURTH CAUSE OF ACTION
Breach of Written Contract

72. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 50 inclusive, as though fully set forth herein.

73. Plaintiff and Defendant entered into a written contract whereby Defendant promised to pay bonus wages to Plaintiff under a "*special incentive program*".

74. Plaintiff earned bonus wages under the aforementioned "*special incentive program*" but, to date, Defendant has not yet paid such bonuses.

75. In or about March of 2011 and 2012, and again in March of 2013 and thereafter, Plaintiff's superiors and Defendant's managing agents assured Plaintiff that [redacted] "*special incentive program*" bonus wages had been earned and would be paid. Plaintiff relied on these promises, and continues to rely on them out of respect for Defendant's word, as Defendant prides itself as a fair and honest employer, but, to date, Defendant has not abided by its word or paid Plaintiff the "*special incentive program*" bonus wages [redacted] has earned.

WHEREFORE, Plaintiff prays for judgment against Defendant as set forth below.

/ / /

/ / /

FIFTH CAUSE OF ACTION
Violation of Labor Code § 226(b), (c)

76. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 50 inclusive, as though fully set forth herein.

77. On or about March 6, 2016, and pursuant to Labor Code Section 226, subdivision (b), Plaintiff made a written request to Defendant for a copy of the records regarding [redacted] pay which records Defendant is obligated to maintain pursuant to Labor Code Section 226, subdivision (a).

78. Despite Plaintiff's demand Defendant failed to provide the aforementioned pay records within the 21-day period required by Labor Code Section 226, subdivision (c).

79. Pursuant to Labor Code Section 226, subdivisions (f) and (h), Plaintiff is entitled to recover from Defendant a penalty in the amount of $750, plus reasonable attorney fees and costs.

WHEREFORE, Plaintiff prays for judgment against Defendant as set forth below.

SIXTH CAUSE OF ACTION
Violation of Labor Code § 1198.5

80. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 50 inclusive, as though fully set forth herein.

81. On or about February 9, 2016, and pursuant to Labor Code Section 1198.5, Plaintiff made a written request to Defendant for a copy of [redacted] personnel records which Defendant is obligated to maintain.

82. Despite Plaintiff's demand Defendant failed to provide the aforementioned personnel records within the 30-day period required by Labor Code Section 1198.5, subdivision (b).

83. Pursuant to Labor Code Section 1198.5, subdivisions (k) and (*l*), Plaintiff is entitled to recover from Defendant a penalty in the amount of $750, plus reasonable attorney fees and costs.

WHEREFORE, Plaintiff prays for judgment against Defendant as set forth below.

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///

///

PRAYER FOR RELIEF

Plaintiff prays for judgment against Defendant as follows:

1. For economic damages, consisting of the past and future wages, benefits, and other opportunities of employment that Plaintiff has lost due to Defendant's wrongful conduct, according to proof;

2. For non-economic damages, consisting of past and future damages to compensate Plaintiff for the severe emotional distress caused by Defendant's wrongful conduct, according to proof;

3. For punitive and exemplary damages in an amount sufficient to punish and deter Defendant for its malicious conduct;

4. For an award of reasonable attorneys' fees and costs, including expert witness fees, pursuant to California Government Code § 12965, subdivision (b);

5. For payment of all earned "*special incentive program*" bonuses, plus interest pursuant to Labor Code § 218.6;

6. For an award of reasonable attorney fees and costs pursuant to Labor Code § 218.5;

7. For the maximum penalty pursuant to Labor Code § 226, subdivision (f);

8. For an award of reasonable attorneys' and costs pursuant to Labor Code § 226, subdivision (h);

9. For the maximum penalty pursuant to Labor Code § 1198.5, subdivision (k);

10. For an award of reasonable attorneys' and costs pursuant to Labor Code § 1198.5, subdivision (*l*); and

11. For such other and further legal or equitable relief as the Court deems proper and just.

DATED: April 5, 2016

MILLSTONE PETERSON & WATTS, LLP
Attorneys at Law

By: _____
JEREMY S. MILLSTONE
Attorneys for Plaintiff

APPENDIX C

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C) | (b) (6), (b) (7)(C)@kellyservices.com | www.linkedin.com/(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

— Top Skills —

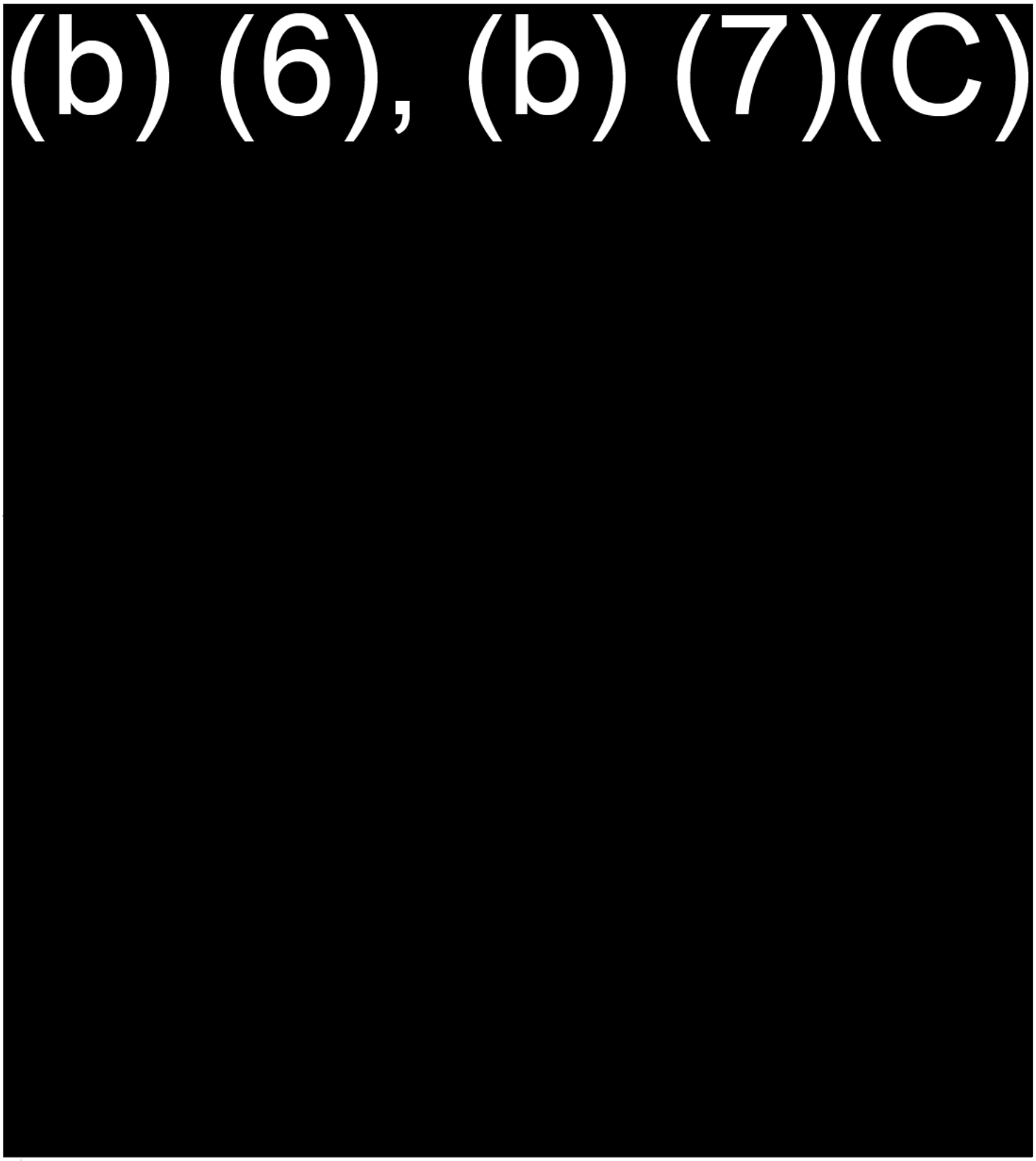
(b) (6), (b) (7)(C)

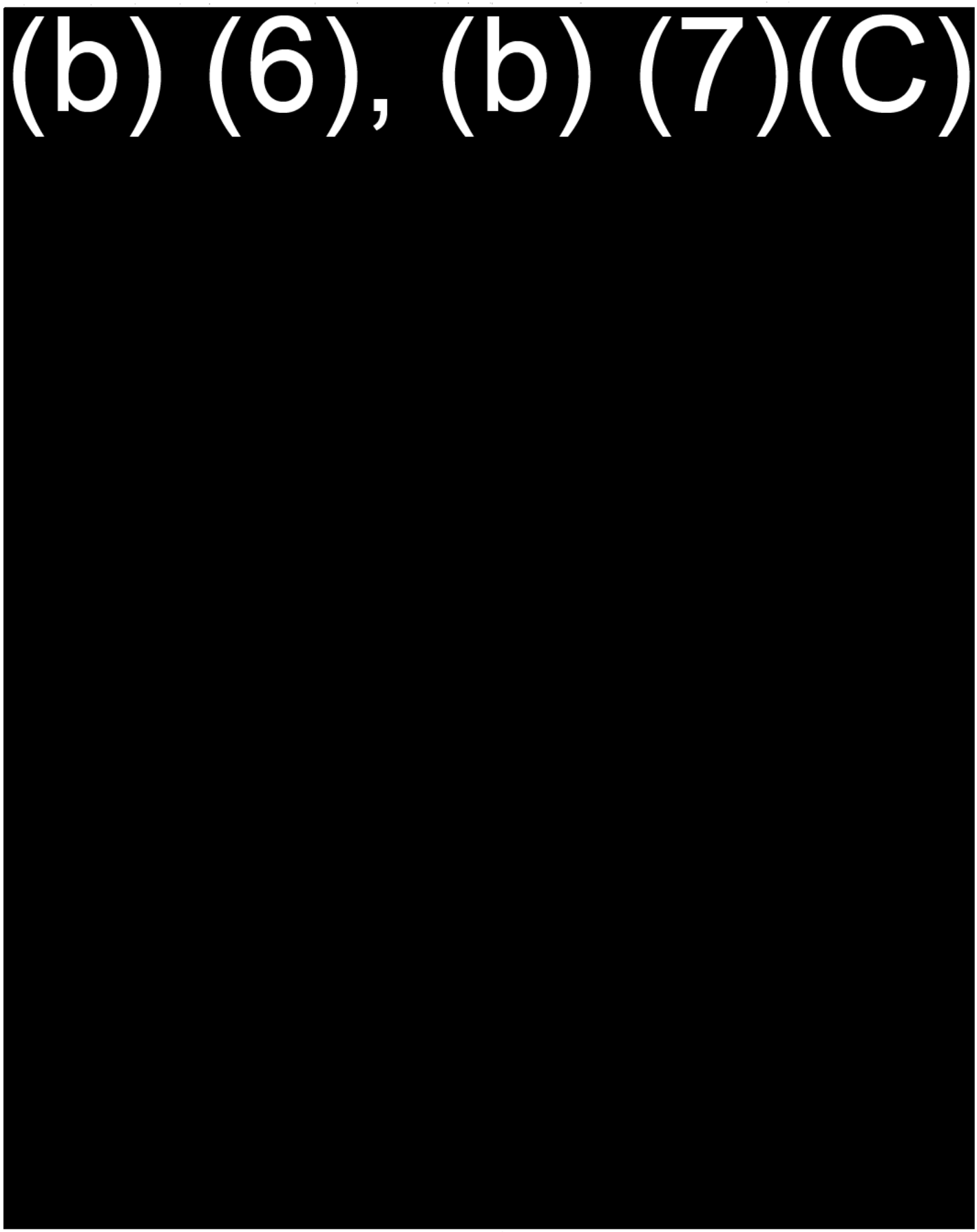
PROFESSIONAL EXPERIENCE

KELLY SERVICES, INC.

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)


(b) (6), (b) (7)(C)


(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

ACADEMIC BACKGROUND

(b) (6), (b) (7)(C)

PROFESSIONAL AFFILIATIONS

(b) (6), (b) (7)(C)

APPENDIX D

SELF-NOMINATION: Global Practice Consultant

PLEASE READ THE INSTRUCTIONS BELOW:

- This is the nomination form for the ***Global Practice Consultant*** (b) (6), (b) (7)(C) Please complete a separate nomination form if you are also interested in the Global Practice Strategy Lead role.
- Please include your name.
- ***Based on both your Kelly as well as previous work history, please answer the questions below.***
- When you've finished, please save and email to **Mailbox Center of Excellence**.
- **Optional** – You may also send a copy of your **resume** along with your nomination(s).
- If you have questions, you may reach out to Maureen Goodin.

Name:	(b) (6), (b) (7)(C)

1.	Do you have a Bachelor's Degree or equivalent experience?	**Yes** ☒	**No** ☐

		Low	**Med**	**High**
2.	What level of experience do you have in introducing, validating and executing products and solutions in global markets?	(b) (6), (b) (7)(C)		
	Please describe, with relevant details, your experience in introducing, validating, and executing products and solutions in global markets: [please see attachments] (b) (6), (b) (7)(C)			
3.	What level of experience do you have in product management /development experience?	(b) (6), (b) (7)(C)		
	Please describe, with relevant details, your experience in product management/development experience: [please see attachments] (b) (6), (b) (7)(C)			
4.	What level of experience do you have in market intelligence and positioning (e.g., value proposition, market readiness, and pricing within various markets)?	(b) (6), (b) (7)(C)		
	Please describe, with relevant details, your experience in market intelligence and positioning (e.g., value proposition, market readiness, and pricing within various markets): [please see attachments] (b) (6), (b) (7)(C)			

(b) (6), (b) (7)(C)

5. What level of experience do you have in demonstrated thought leadership (you are sought out both internally and externally for your expertise)? (b) (6), (b) (7)(C)

Please describe, with relevant details, your experience in demonstrated thought leadership (you are sought out both internally and externally for your expertise):

[please see attachments] (b) (6), (b) (7)(C)

6. At what level have you demonstrated forward thinking and proven understanding of customers and market trends? (b) (6), (b) (7)(C)

Please describe, with relevant details, your demonstrated forward thinking and proven understanding of customers and market trends:

[please see attachments] (b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

7. At what level is your outsourcing experience? (b) (6), (b) (7)(C)

Please describe, with relevant details, your outsourcing experience:

[please see attachments] (b) (6), (b) (7)(C)

APPENDIX E

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

Agency Website: www.nlrb.gov
Telephone: (415)356-5130
Fax: (415)356-5156

May 17, 2016

(b) (6), (b) (7)(C)

Re: Kelly Services, Inc.
Case 20-CA-172971

Dear (b) (6), (b) (7)(C):

We have carefully investigated and considered your charge that Kelly Services, Inc. has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the following reasons. The investigation showed that your most recent position as the (b) (6), (b) (7)(C) for Kelly Services, Inc. was a management role. Under applicable legal authority, management personnel are excluded from the protections afforded employees under Section 7 of the National Labor Relations Act, as the nature of their duties closely aligns them with management interests. *See NLRB v. Bell Aerospace Co*., 416 U.S. 267, 286-289 (1974). Therefore, any alleged retaliation against you for concerted activity, if it occurred, would not be a violation of the Act.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **E-File Documents,** enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **May 31, 2016**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than May 30, 2016. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be

received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before** May 31, 2016**.** The request may be filed electronically through the **E-File Documents** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after May 31, 2016, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/

JOSEPH F. FRANKL
Regional Director

Enclosure

cc: E. JOSEPH CONNAUGHTON
PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP
101 WEST BROADWAY NINTH FL
SAN DIEGO, CA 92101-8285

KELLY SERVICES, INC.
999 WEST BIG BEAVER RD
TROY, MI 48084

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

_____

Case Name(s).

_____

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

_____

(Signature)

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
09-CA-184055	September 12, 2016

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer		b. Tel. No.
Kelly Services		(859)282-6157
		c. Cell No.
d. Address (street, city, state ZIP code)	e. Employer Representative	f. Fax No.
2482 Turfway Rd Erlanger, KY 41018		g. e-Mail
		h. Dispute Location (City and State) Erlanger, KY
i. Type of Establishment (factory, nursing home, hotel)	j. Principal Product or Service	k. Number of workers at dispute location
TEMPORARY EMPLOYER	TEMPORARY JOB ASSIGNMENTS	25

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) **and (3)** of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

ABOUT [redacted] 2016, THE ABOVE-NAMED EMPLOYER FAILED AND REFUSED TO HIRE [redacted] IN RETALIATION FOR [redacted] UNION AFFILIATION AND ACTIVITY.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)

[redacted]

4a. Address (street and number, city, state, and ZIP code)	4b. Tel. No.
[redacted]	4c. Cell No. [redacted]
	4d. Fax No.
	4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)

6. DECLARATION **I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.**	Tel. No.
By: [redacted]	Office, if any, Cell No. [redacted]
(sign [redacted] or person making charge) — [redacted] An Individual — Print Name and Title	Fax No.
Address: [redacted] — Date: 09/12/2016	e-Mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes. [redacted]

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlrb.gov
Telephone: (513)684-3686
Fax: (513)684-3946

Download
NLRB
Mobile App

September 13, 2016

Kelly Services
2482 Turfway Rd
Erlanger, KY 41018

Re: KELLY SERVICES
Case 09-CA-184055

Dear Sir or Madam:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney DANIEL GOODE whose telephone number is (513)684-3678. If this Board agent is not available, you may contact Supervisory Examiner PATRICIA A. ENZWEILER whose telephone number is (513)684-3769.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If

you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Garey Edward Lindsay
Regional Director

Enclosures:
1. Copy of Charge
2. Commerce Questionnaire

Revised 3/21/2011 NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
	09-CA-184055

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed).*

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT *(Check appropriate box):* **[ ] CALENDAR YR [ ] 12 MONTHS or [ ] FISCAL YR** *(FY dates)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $		
H. **Gross Revenues** from all sales or performance of services ***(Check the largest amount)*** [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KELLY SERVICES Charged Party and (b) (6), (b) (7)(C) Charging Party	**Case 09-CA-184055**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on September 13, 2016**,** I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Kelly Services
2482 Turfway Rd
Erlanger, KY 41018

September 13, 2016	Evelyn J. Fairbanks, Designated Agent of NLRB
Date	Name
	/s/ Evelyn J. Fairbanks
	Signature

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlrb.gov
Telephone: (513)684-3686
Fax: (513)684-3946

Download
NLRB
Mobile App

September 13, 2016

(b) (6), (b) (7)(C)

Re: KELLY SERVICES
Case 09-CA-184055

Dear (b) (6), (b) (7)(C):

The charge that you filed in this case on September 12, 2016 has been docketed as case number 09-CA-184055. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney DANIEL GOODE whose telephone number is (513)684-3678. If this Board agent is not available, you may contact Supervisory Examiner PATRICIA A. ENZWEILER whose telephone number is (513)684-3769.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing *Form NLRB-4701, Notice of Appearance*. This form is available on our website, www.nlrb.gov, or at the Regional office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: As the party who filed the charge in this case, it is your responsibility to meet with the Board agent to provide a sworn affidavit, or provide other witnesses to provide sworn affidavits, and to provide relevant documents within your possession. Because we seek to resolve labor disputes promptly, you should be ready to promptly present your affidavit(s) and other evidence. If you have not yet scheduled a date and time for the Board agent to take your affidavit, please contact the Board agent to schedule the affidavit(s). If you fail to cooperate in promptly presenting your evidence, your charge may be dismissed without investigation.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website www.nlrb.gov or from the

Regional Office upon your request. *NLRB Form 4541, Investigative Procedures* offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Garey Edward Lindsay
Regional Director

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlrb.gov
Telephone: (513)684-3686
Fax: (513)684-3946

November 7, 2016

(b) (6), (b) (7)(C)

Re: KELLY SERVICES
Case 09-CA-184055

Dear (b) (6), (b) (7)(C):

We have carefully investigated and considered your charge that Kelly Services has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge because there is insufficient evidence to establish a violation of the Act.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **E-File Documents,** enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **November 21, 2016**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than November 20, 2016. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before November 21, 2016.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after November 21, 2016, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

Garey Edward Lindsay
Regional Director

Enclosure

cc: Kelly Services
2482 Turfway Rd
Erlanger, KY 41018

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

_____

Case Name(s).

_____

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

_____

(Signature)